***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,639

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BEATRICE W. OPPENHEIMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

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**On Petition to Review a Decision of the Tax Court of the District of Columbia**

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## BRIEF FOR APPELLANT AND JOINT APPENDIX

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### JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under section 47-2401 of the District of Columbia Code (1961). The jurisdiction of the District of Columbia Tax Court, from which appeal is taken herein, was properly invoked under section 47-2403 of the District of Columbia Code (1961) by timely and proper petition (J.A. 2).

## STATEMENT OF THE CASE

On January 2, 1953, General Realties, Inc., a Delaware corporation, distributed its assets to its shareholders in final liquidation, in consideration of the return to the corporation of the shareholders' stock. As a result of this distribution, Appellant received certain depreciable assets with a fair market value, at the date of distribution, of $842,513.95 (J.A. 18).

The distribution was held to be a "dividend" to the extent that it represented earnings, profits and surplus of General Realties, Inc. The larger part of that distribution, however, was held to be a distribution not a dividend. *District of Columbia* v. *Oppenheimer*, 112 U.S. App. D.C. 239, 301 F. 2d 563 (1962). That portion of the property held to be a "dividend" amounted to $135,248.75 (J.A. 18).

The depreciable assets distributed to the Appellant were depreciated on her books on the "basis" of their fair market value on date of distribution, annual depreciation deductions being taken according to the declining balance method over a lifetime of fifteen years. In 1960 and 1961 the following depreciation was taken (J.A. 20):

| | |
|---|---|
| 1960 | $37,874.23 |
| 1961 | $34,124.75 |

The District of Columbia contended that the above depreciation ought to be disallowed because the "basis" was improperly high. The District of Columbia Tax Court reasoned that since only a small tax was imposed upon the distribution of those assets, only a small "basis" for depreciation should be allowed. (J.A. 30, 31). That Court held that the proper "basis" for depreciation was derived by adding together that part of the distribution which was deemed a "dividend", and an amount equal to the Appellant's original investment. This method of determining the proper "basis" for calculating a depreciation deduction is not provided for by the statute. (J.A. 29, 33, 34).

The Appellant, on the other hand, contends that the proper "basis" for depreciation of the property involved was the fair market value of the property at the date of distribution. This is the "basis" which is provided for in Title XI, Section 6(b) of the District of Columbia Income and Franchise Tax Act of 1947, as amended.

## STATUTES INVOLVED

### District of Columbia Income and Franchise Tax Law

Title III, section 3(a)(7)

A reasonable allowance for exhaustion, wear, and tear of property used in trade or business, including a reasonable allowance for obsolescence; and including in the case of natural resources allowances for depletion as permitted by reasonable rules and regulations which the Commissioners are hereby authorized to promulgate. The basis upon which such allowances are to be computed is the basis provided for in title XI, section 6, of this article.

Title XI, section 1

The basis for determining the gain or loss from the sale, exchange, or other disposition of property shall be the cost of such property, except that—

(a) If the property is of a kind which would properly be included in the inventory of the taxpayer, if on hand at the close of the taxable year, the basis shall be the last inventory value thereof.

(b) In respect of any real or tangible property acquired after December 31, 1938, the cost thereof shall be adjusted as follows:

(1) By adding to its original cost to the taxpayer the amount of all expenditures connected therewith, including real estate taxes upon the property, which were properly chargeable to capital account and were not deducted in any income-tax return which the taxpayer was required to file under the provisions of this

article or the District of Columbia Income Tax Act of 1939, as amended; but such additions as are herein provided for shall include only those expenditures made by the taxpayer between the time the property was acquired by him and the date of sale or other disposition of the property.

(2) By deducting from such cost the full loss sustained since acquisition for exhaustion, wear and tear, obsolescence, amortization, and depletion to the extent allowed or allowable (whichever amount is the greater) on such property in all returns required to be filed by the taxpayer under the provisions of this article or of the District of Columbia Income Tax Act of 1939, as amended.

(3) In the case of property (including intangible personal property) acquired by gift or inheritance, where the transfer thereof to the taxpayer was subject to tax by the United States or by any jurisdiction in which the property had a taxable situs at that time, the basis of the property so acquired shall be the highest valuation then placed upon such transfer by the United States or by any authorized taxing State or Territory thereof. If such transfer of the property was not subject to the aforesaid transfer tax, the base shall be the fair market value of such property at the time acquired. For the purpose of this subsection, the time such inherited property was acquired shall be the date of death of the decedent. The basis herein provided shall be subject to the appropriate adjustment or adjustments defined in section 1(b) of this title.

(c) If the property was acquired before January 1, 1939, the basis shall be the fair market value as of that date or, at the option of the taxpayer, the cost of such property, and in the case of real or tangible property such cost shall be diminished by exhaustion, wear and tear, obsolescence, and depletion actually sustained before such date:

*Provided, however,* That the preceding valuation so determined shall be adjusted by the appropriate additions and deductions provided for in section 1(b) of this title to cover the period from January 1, 1939, to the date of sale or other disposition of the property.

TITLE XI, section 6

The bases used in determining the amount allowable as a deduction from gross income under the provisions of section 3(a)(7) of title III of this article shall be—

(a) where the property was acquired after December 31, 1938, by purchase, the basis shall be the cost thereof to the taxpayer;

(b) where the property was received in exchange for other property after December 31, 1938, the basis shall be the market value thereof at the time of such exchange;

(c) where the property was inherited or acquired by gift after December 31, 1938, the basis shall be that defined in subsection 1(b)(3) of this title;

(d) if the property was acquired prior to January 1, 1939, the appropriate basis set forth in subsection (a), (b), or (c) of this section shall be used: *Provided, however,* That the taxpayer may, at his option, use as the basis the market value of such property as of January 1, 1939;

(e) the taxpayer may deduct in each taxable year only such amount of depreciation as was actually sustained during that year and such annual deduction shall be based upon the useful life of the property remaining after the date used by the taxpayer in establishing the valuation: *Provided, however,* That the allowance for depreciation actually sustained during any taxable year may not be increased by any depreciation of the property which was allowable as a deduction in any earlier taxable year: *And provided further,* That any basis so established may not be changed in a subsequent taxable year, unless written approval of the Assessor has been first obtained.

## STATEMENT OF POINTS

1. The proper "basis" for depreciation in this case is the fair market value of the property at the time of the exchange—the date of distribution—as provided for in Title XI, Section 6(b) of the District of Columbia Tax Act of 1947, as amended, codified as Section 47-1583e(b) of the District of Columbia Code of 1961, as amended.

2. *Berliner* v. *District of Columbia,* 103 U.S. App. D.C. 351, 258 F. 2d 651 (1958) does not decide the issue in this case. There, the Court of Appeals held only that a liquidation distribution of assets by a corporation did not give rise to such an "exchange" as to render the proceeds *non-taxable* capital gain because, the court held, such distribution gives rise to a *taxable* dividend. There is no suggestion in that case that a non-dividend liquidation distribution of assets by a corporation could not be an "exchange" for purposes of determining the "basis" of the assets in the hands of the recipients, for purposes of calculating the proper depreciation deduction.

3. Title III, Section 3(a)(7) of the District of Columbia Tax Act of 1947, as amended, provides for a reasonable allowance for depreciation, and states that such allowance shall be computed in accordance with the "basis provided for in Title XI, Section 6" of that Act. No other source may be drawn upon to determine such "basis" so long as Section 6 can be applied according to its plain meaning.

4. The construction of a tax statute depends on the ordinary meaning of its terms, and not upon notions of the "science of taxation" and "reasonableness", unless such notions are shown to be directly relevant and necessary to such interpretation. Without a showing of a legislative purpose and intent which invites such, the Tax Court has no jurisdiction to correct apparent "unreasonableness" resulting from the application of such statute. This correction, if such it be, is a purely legislative and not a judicial function.

## SUMMARY OF ARGUMENT

The District of Columbia Tax Court imposed a standard for finding the "basis" for determining the appropriate depreciation deduction to be taken by the Appellant in computing net income, without reference to, and from sources completely outside, the District of Columbia Tax Act of 1947, as amended. This was accomplished, in part, by erroneously deciding that the "basis" of any given property must be the same for all purposes under that statute. This is patently not true. The taxing statute shows "basis" to be a multifarious and divergent concept, which makes sense only in a specific context, where the nature of the property involved, the type of transaction, and the specific tax purpose to be served, are the operative factors. Secondly, the Tax Court determined that the transaction in which the depreciable property was obtained could not be deemed an "exchange" for purposes of determining basis for depreciation. This finding rested on the holding of *Berliner* v. *District of Columbia,* infra, even though the Court in that case was not concerned at all with the problem presented in the case at bar. Finally, the Tax Court found that the Tax Act did not provide a "basis" for the taxpayer's property, and therefore devised one of its own, more consistent with its concept of the "science of taxation". This legislation was completely beyond the jurisdiction of the Tax Court.

It is clear from reading the Tax Act that there is no "omitted case" in the section on "basis" for depreciation. Taken in their ordinary meaning, and in the context of the tax purpose for which used, the words of that section include all transactions by which property is obtained. For the purpose of section 6, this transaction was an "exchange", and the Appellant has a statutory right to the "basis" provided by the legislature for depreciation, until such time as the legislature deems it wise to change the law.

## ARGUMENT

### A. INTRODUCTION

The District of Columbia Tax Court decided that, where only part of a corporation's liquidation distribution is deemed a "dividend" for purposes of computing gross income, then only that part, plus the taxpayer's original investment, is useable as the "basis" for determining the proper depreciation allowance with regard to that whole distribution. For example, in a corporate distribution of depreciable property, worth at distribution, $1,000,000.00, only $10,000.00 of that distribution represents a taxable dividend. The original investment of the taxpayer was $1,000.00. This would mean that the "basis" of all the depreciable property distributed, for purposes of depreciation, would depend upon allocation of $11,000.00 among $1,000,000.00 worth of depreciable assets. This result is without foundation in the Tax Act, nor has it any support from the decisions of this Court. There is only the concept of the District of Columbia Tax Court of "the science of taxation" and "reasonableness", to justify this formula as applied in the case at bar.

The Tax Court reached its decision by making two critical assumptions:

(1) "Basis" is an unitary concept. That is, "basis" for one purpose—eg. the computation of taxable gain—is "basis" for all other tax purposes.

(2) When a transaction is held to give rise to a taxable dividend, rather than an "exchange" which produces a non-taxable capital gain, then such transaction can never give rise to an "exchange" for any purpose under the Tax Act, even when there is no issue as to taxability *vel non*.

**B. THE BASIS FOR DEPRECIATION IS FULLY TREATED BY THE TAXING STATUTE AND IS A SINGULAR AND SEPARATE CONCEPT.**

The District of Columbia Income and Franchise Tax Act provides for the allowance of a depreciation deduction in section 3(a)(7) of Title III, stating that:

> The basis upon which such allowances *are to be* computed *is the* basis provided for in *Title XI, Section 6,* of this article. (Emphasis added.)

It is the contention of appellant that the statutory injunction above is not subject to exception unless such exception is explicitly set forth in the statute. The words mean precisely what they say—that the "basis" provided in Title XI, Section 6 is "the" one and only "basis" which may properly be used in this context. No other reasonable construction—for example a permissive or merely suggestive one—can be put on the above language. The only manner of escape from this result is through the dubious route of *"casus omissus"*—that the statute does not cover this case at all—as used by the District of Columbia Tax Court.

**1. The Nonunitary Character of "Basis" in the Tax Act**

The rules for determining which "basis" to apply in the computation of gain, loss, depreciation, and the amount of dividends paid in property, are set out in Title XI of the Tax Act and *nowhere else* in the statute. That Title is divided into six sections:

Section 1. Basis for Determining Gain or Loss
Section 2. Computation of Gain or Loss
Section 3. Exchange in Reorganization
Section 4. Basis for Dividends Paid in Property
Section 5. Application of Sections 1 to 3
Section 6. Depreciation.

As is readily seen the above sections cover all of the areas of the taxing statute in which "basis" plays a role. Furthermore, it is apparent from the above listing that

different methods, separately stated in Title XI of the Tax Act, are applied in order to determine what "basis" to use for any one of several tax purposes.

Even within the various sections treating with "basis" for different purposes, there are distinctions made between different "bases" for different kinds of property, acquired in different ways. Note, for example, the four methods of determining "basis" for computing gain or loss, as they are found in Title XI, Section 1. If property is an *inventory item,* then "basis" for gain or loss changes through the years according to the last inventory value for the given tax year. If, on the other hand, the property is not an inventory item, but is *acquired by purchase,* then its "basis" for determining gain or loss is its original cost, plus non-deductible capital expenditures, less deductible depreciation and losses. A third "basis" valuation is given to property which is *inherited or acquired by gift.* Here, the "basis" for computing gain or loss is the fair market value of the property at the time of transfer. But if the transfer was taxed, then the "basis" of the property for purposes of gain or loss is the highest transfer tax valuation received. Finally, if property was *acquired before January 1, 1939,* that property's "basis" for computing gain or loss may be either the value of that property on January 1, 1939, or the actual cost of the item to the taxpayer when acquired, at the taxpayer's option. Of course, the above transfers all result in a "basis" for gain or loss which is adjustable by capital expenditures and deductible loss and depreciation with regard to that property.

It is clear from the above that there is no necessarilly central, generic, universally applicable standard of "basis" which is applied to all property for all purposes. Nor is it necessarily "illogical" or "inequitable" that the same property have different "bases" for different tax purposes, and by virtue of the manner in which that property

was obtained. That the nature of "basis" varies according to the tax situation is made even more obvious by the very arrangement of both the title on "basis" and section 6 thereof, which contains the rules for determining "basis" for depreciation:

> *The bases* used in determining the amount allowable as a deduction from gross income under the provisions of section 3(a)(7) of Title III of this article *shall be*—
>
> (a) where the property was acquired after December 31, 1938, by purchase, the basis shall be the cost thereof to the taxpayer;
>
> (b) where the property was received in exchange for other property after December 31, 1938, the basis shall be the fair market value thereof at the time of such exchange;
>
> (c) where the property was inherited or acquired by gift after December 31, 1938, the basis shall be that defined in subsection 1(b)(3) of this title;
>
> (d) if the property was acquired prior to January 1, 1939, the appropriate basis set forth in subsection (a), (b) or (c) of this section shall be used: *Provided, however,* That the taxpayer may, at his option, use as the basis the market value of such property as of January 1, 1939;
>
> (e) the taxpayer may deduct in each taxable year only such amount of depreciation as was actually sustained during that year and such annual deduction shall be based upon the useful life of the property remaining after the date used by the taxpayer in establishing the valuation: *Provided, however,* That the allowance for depreciation actually sustained during any taxable year may not be increased by any depreciation of the property which was allowable as a deduction in any earlier taxable year: *And provided further,* That any basis so established may not be changed in a subsequent taxable year, unless written approval of the Assessor has been first obtained. (emphasis supplied)

Just as the first section of this title deals solely with the computation of basis for determining gain or loss, so does the sixth section, quoted above, deal solely, and exclusively, with the computation of basis for the determination of allowable depreciation. No other section in title XI [redacted], nor any other section in the D. C. Tax Act, deals with such basis. Furthermore, it is readily seen that the basis for depreciation is separately dealt with because it is, in fact, a *differently determined* basis.

### 2. The Divergent Character of "Basis" in the Tax Act

The divergence between the "basis" of property for purposes of computing gain or loss, and the "basis" of that same property for purposes of determining the proper annual depreciation deduction, is well illustrated by the following example:

The gift of a house is made prior to January 1, 1939. The value of the house acquired by gift in January, 1937, no transfer tax being paid or levied, was $10,000. The value of the house on January 1, 1939, was $7,000. The donor of the house had purchased it in 1935 for $9,000. The taxpayer rented the house in December, 1938, and finally sold it in March, 1944 for $10,000. In order to determine the "basis" of the property in the hands of the taxpayer for depreciation, the taxpayer had a choice of the fair market value of that house on January 1, 1939, or the fair market value of the house when he received it from the donor. (Section 6(d) and 6(c), *supra*). *The* taxpayer would probably use the basis of $10,000, it being the higher of the two. On the other hand, if gain or loss on the sale of the house is to be computed, then the taxpayer must start with the fair market value of the house on January 1, 1939, or $7,000.00, adjusted upward for capital expenditures on it, and downward for deductions

taken for depreciation. Hence, on January 1, 1939, this taxpayer started out with two entirely different bases!

Note also that *changes* in "basis" for the computation of gain or loss and for the computation of depreciation deductions are treated differently. Under subsections 1(b)(1) and (2), changes in the amount of "basis" are automatic. The original "basis" for gain or loss is increased each year by the non-deductible capital expenditures made on that property that year, and decreased by depreciation deductions which are allowed for that year. Thus, the final "basis" for determining gain or loss of the property is not known until the sale of that property. On the other hand, once the "basis" for determining depreciation is determined, it is immutable unless such change is specifically assented to by the Assessor's office. (Subsection 6(e)).

The above shows that the Tax Act treats differently the determination of whether, and the extent to which, a transaction gives rise to taxable income or deductible loss; and the determination of the extent to which depreciation may be deducted from gross income. As to the latter, the Act prescribes a "reasonable allowance" computed in accordance with the rules set out under Title XI, Section 6. As to the former, the Tax Act prescribes the subtraction of "basis" determined under Section 1, Title XI, from an "amount realized", under Section 2 of that title. The contingencies involved in determining the final "gain or loss" figure depend not only on market conditions, but also on the activity of the taxpayer in regard to the items involved. "Basis" for this purpose changes automatically, according to the relationship of deductible items and capital expenditures as to such items, from acquisition to disposition of those items. On the other hand, "basis" for determining the annual depreciation allowance is a less fluid, more fixed concept, which cannot change save by the destruction of the item depreciated or the assent of the taxing authority.

Finally, the very language of Section 6, Title XI, points squarely to the intended difference between the two "basis" concepts. Where two separate sections of a statute are to receive parallel construction, such intent should be plain from the language of the two sections or from an implicit similarity in their subject matter. There is no language in Section 6 or Section 1 to suggest that such parallel treatment is to be intended. On the other hand, there is language in subsection 6(c) which states that the "basis" of property acquired by gift or inheritance is the same for purposes of "gain or loss" and for "depreciation". No other subsection contains such language. Furthermore, if Congress intended that the whole of Section 6 was to be treated as similar or parallel to Section 1, there would have been no need for this special and exceptional reference in subsection 6(c). For this reason, as well as others, it must be clear that Section 6 and Section 1 were never intended to be read as dealing with the same, central, concept, but rather with two distinct notions of "basis".

It is for the above reasons that the argument of the Tax Court that the "basis" for depreciation and the "basis" for determining "gain or loss" are essentially the same (J.A. 30-33) is erroneous. It is also for these reasons that the example, brought up by Petitioner in *Oppenheimer* v. *District of Columbia,* D.C. Tax Court Docket 1709 (1961), is totally inapposite as it was used by the District of Columbia Tax Court in the opinion below (J.A. 31-32). There is no inconsistency between appellant's position in that case and her position in this, save such apparent inconsistency as may appear from a comparison of Sections 1 and 6 of Title XI, District of Columbia Tax Act.

It being clear, then, that Sections 1 and 6 are exclusive and different in their treatment of "basis", it should also be clear that Section 6 is exhaustive in its treatment, as Congress intended it to be. That being so, the only reasons

for contradicting the applicability of Section 6 in treating this area of taxation are:

a. That the transaction whereby the property was acquired was not an "exchange".

b. That the transactions whereby the property was acquired *ought not* be an "exchange", because if it were, the taxpayer would benefit from an inconsistency in the Tax Act.

**C. THE TRANSACTION WHEREBY THE PROPERTY INVOLVED HERE WAS OBTAINED WAS AN "EXCHANGE" FOR PURPOSES OF DETERMINING BASIS FOR DEPRECIATION.**

The District of Columbia Tax Court held that the liquidating distribution of a corporation, not a "dividend", is not an "exchange" under the District of Columbia Tax Act of 1947, as amended. This decision was based on a highly specialized definition of the term, "exchange", and on an explicit desire to bring the District of Columbia Tax Act in line with allegedly current trends in the "science of taxation". (See J.A. 32-33). This flies in the face of two established principles: (1) that a statute, including a taxing statute, should be interpreted in accordance with the plain meaning of its words unless it is clear that such words are used in a technical manner. *Old Colony Railroad Company* v. *Commissioner of Internal Revenue,* 284 U.S. 552 (1932); *Crane* v. *Commissioner of Interanl Revenue,* 331 U.S. 1 (1947); and (2) that the power to levy taxes and distribute the actual tax burden is a peculiarly legislative function and has never been held to be a judicial function without express provision to that effect in the constitution or organic law of the jurisdiction, *Rees* v. *City of Watertown,* 86 U.S. 107 (1873); *State Railroad Tax Cases,* 92 U.S. 575 (1875); *Spencer* v. *Merchant,* 125 U.S. 345 (1888).

In the light of the above well-settled rules, it is clear that, where possible, and where necessary to give full scope to the statutory language, the ordinary import of a word—especially a generic term, such as "exchange"—should be used, unless such use in a specified context conflicts with

the clear statutory scheme at that point. Furthermore, it is clear that a court may not manufacture omissions or omitted cases in the language of a taxing statute in order to rectify, in the name of the "science of taxation" apparent inequities therein. This, expecially, when there is a clear legislative intent to include all cases of acquisition of depreciable property in the language of the Act, and despite the includibility of the so-called "omitted case" within the plain meaning of the language considered.

**1. The Berliner and Uline Cases Do Not Govern the Case at Bar**

*Berliner* v. *District of Columbia,* 258 F. 2d 651, 103 U.S. App. D.C. 351 (1958), held that a corporate liquidation distribution is to be deemed taxable as a dividend insofar as it is commensurate with that corporation's earnings, profits and surplus. The court stated the only question involved in the case, as follows:

> . . . whether amounts distributed in complete liquidation of a corporation to the extent that these amounts exceed the cost of the stock and represent corporate earnings, are properly includible in the stockholder's gross income as a *dividend* under Section 47-1551c(m) of the District of Columbia Code (1951). (258 F. 2d at 652). (Emphasis added.)

In opposition to the claim that such distribution was taxable income, the taxpayer contended that "the transaction should be held to be an exchange, the gain from *which is excluded from gross income* by Section 47-1557(b)(11)." (F. 2d at 655) (emphasis added)

There was only one issue: Was the "gain" resulting from the corporation's liquidation distribution taxable as a *dividend,* or non-taxable as a "sale or exchange" of a "capital asset"—a capital gain? The court held that the gain was taxable and that the transaction was a *"dividend"* and, *therefore,* not such an "exchange" as yields tax-free gain. Throughout the decision, the word, "exchange", was used solely in the capital-gain context, and

in no other way. Indeed, the court strongly suggested that, were there no such opposition between *"dividend"* and *"exchange"*, the transaction might well be deemed an exchange:

> The courts have frequently recognized that a distribution of earnings in liquidation may rationally be treated as a dividend *as well as* an exchange. (F. 2d at 655) (emphasis added).

The language of the *Berliner* decision cannot reasonably be stretched beyond its holding—that the liquidation distribution involved there was a taxable *dividend* (to the extent of earnings, profits, and surplus) and, *therefore,* not an exchange which gives rise to non-taxable gain.

*Uline* v. *District of Columbia,* D.C. Tax Court Docket 1871 (1963), involved a similar situation to that in *Berliner,* supra. The corporation sold its assets, and then liquidated, distributing the money to the shareholders. The court, held that there was no "sale or exchange" and rested its decision fully on the capital gains and dividends provisions of the Tax Act.

Neither *Uline* nor *Berliner* states or requires that a transaction cannot be differently denominated for different tax purposes. Both cases deal solely with a conflict between two sections of the Tax Act as to whether a certain kind of transaction gives rise to taxable income. No attention is given to any other tax problem which may arise in regard to such a transaction. *Neither case involved the distribution of depreciable assets,* thus excluding any reason for the Court to consider "basis" problems.

Both *Uline* and *Berliner* held that a liquidating distribution which is in an amount equal to earnings, profits and surplus, will result in taxable gain, and not non-taxable capital gain. Neither case, however, states that such distribution is not an "exchange" for purposes other than determining taxability *vel non.*

The above distinctions between the case at bar and *Uline* and *Berliner* are quite real. The purpose of the distinction between "dividend" and "capital gain" does not exist anywhere else but in that part of the Tax Act which deals with gross income. There is no such issue apparent once the question of taxability is absent. Indeed, if one reads the title on "Basis", one can readily see that property acquired in a tax-free capital gain-producing "exchange" would have the same basis for depreciation as would similar property acquired in an "exchange" which produced a taxable gain.

In short, the issue of whether or not an item of gain is taxable at all is in no way the same as the issue of whether, and to what extent, an item is depreciable. The tax one pays on an exchange is obviously not a condition to the depreciability of the item received thereby, the opinion of the Tax Court and the "science of taxation" to the contrary notwithstanding. (See J.A. 20-33) Indeed, the payment of tax is mentioned nowhere in Title XI of the Tax Act with regard to the determination of this "basis" (with the possible exception of items obtained as gifts or by inheritance).

For the above reasons, *Berliner* and *Uline* should play no role in determining the character of the liquidation distribution for purposes of the proper "basis" for depreciation. This is especially true in view of the holding in *District of Columbia* v. *Oppenheimer,* 301 F. 2d 563, 112 U.S. App. D.C. 239 (1962), that the property involved in the case at bar is not a "dividend."

### 2. There Is No "Omitted Case" in the Tax Act

#### a. Definition of Exchange

An "exchange" is the receipt of property for property without reference to money price. In *Badgett* v. *United States,* 175 F. Supp. 120 (W.D. Ky. 1959) the court held that a certain transaction was not an "exchange" under

section 112(b) of the Internal Revenue Code of 1939, because the taxpayer did not "part with" anything:

> The word "exchange" is to be given its ordinary meaning. It is a word of precise import, meaning the giving of one thing for another, requiring the transfer to be in kind and excluding transactions in which money enters either as consideration or as a basis of measure. Trenton Cotton Oil Company v. Commissioner, 6 Cir., 147 F. 2d 33. An "exchange" is a reciprocal transfer of property as distinguished from the transfer of property for money consideration only. Treasury Regulations 118 Section 39.112 (a)-1, (e), promulgated under Internal Revenue Code of 1939. (at 126)

In a business tax case, *Young v. Gerosa,* 202 N.Y.S. 2d 470, 11 A.D. 2d 267 (1960), an exchange was defined as "a commutation of property for property, i.e., the price or consideration is always paid in . . . specific property susceptible of valuation." (Quoting Black's Law Dictionary, 4th Edition). And, in fact, "exchange" has included the delivery of *property for the extinguishment of a debt or claim. Burger-Phillips Co.* v. *Commissioner of Internal Revenue,* 126 F. 2d 934 (5th Cir. 1942).

Shares of stock in the hands of the shareholder, even after dissolution of the corporation, represent a property interest which is destroyed by the transfer and cancellation of the stock. "Dissolution terminates the personal, but not the property rights of stockholders." 16 A Fletcher, Cyclopedia of the Law of Corporations (1962 ed.), Sec. 8130. This is developed in *Bijur* v. *Standard Distilling & Distributing Co., et al.,* 70 A. 934, 74 N.J. Eq. 546 (1908), aff'd 81 A. 1132, 78 N.J. Eq. 582:

> The rights of a stockholder evidenced by the certificate are all comprised in two classes: First, the personal rights inherent in a stockholder as a member of the corporation, being the right to attend meetings, vote, and the like, and including all personal rights as a member; and, second, the property rights, which are

> the rights to share in the distribution of its assets. . . . A dissolution of the corporation terminates those rights of a shareholder which are merely personal to him as a member, but does not terminate his property right in the assets. It has, however, been held that . . . the stockholder can no longer convey any title to his stock by the mere assignment of his certificate. (70 A. at 939).

In *Able-Old Hickory Building and Loan Association* v. *Polansky,* 47 A. 2d 730, 138 N.J. Eq. 232 (1946), the court said:

> Upon dissolution of a corporation, its property becomes a trust fund for creditors and stockholders, and the title evidenced by a stock certificate becomes an equitable right to a distributive share in the fund. Bijur v. Standard Distilling etc. Co., 74 N.J. Eq. 546, 557, 70 A. 934; Id., 78 N.J. Eq. 582.

Finally, in *Griffin* v. *Dyett,* 29 N.Y.S. 2d 486, 262 A.D. 368 (1941), the plaintiff, a shareholder in a liquidating corporation, refused to turn in her shares for a period of five years after the liquidating distribution was made. The liquidating directors, as a result of her action, deposited what they deemed her distributive share in a savings account, where it accumulated interest. When the plaintiff finally tendered her shares, she received only the original amount of what was deemed her original share of the distribution. She sued for the accumulated interest thereon, and won. The court held that the property was held for her benefit until she should tender her stock. At that time she would receive the property, plus all income accruing thereto.

The above considered, the general meaning of the word, "exchange", clearly includes a liquidation distribution of assets by a corporation in return for the shares of the recipients, such as occurred in the case at bar. In fact, such a transaction was denominated an "exchange" in the course of the opinion of the United States Court of

Claims in *Ford Motor Co. (Delaware)* v. *United States*, 47 F. Supp. 259, 262, 97 C. Cls. 370 (1942). See also *Dupont Park Apartments, Inc. et al.* v. *District of Columbia*, D.C. Tax Court Docket 1912 (1964). In *Dupont* the distribution by a corporation of property in return for the shares of the stockholders was deemed a "transfer of property" in "consideration" of the return of the shares. That is, the return of the shares was "consideration" for the distribution. Although, in the case at bar, the Tax Court refused to recognize that property was given for property, that is, that there was an "exchange", yet in the *Dupont* case, supra, the same kind of transaction was recognized to be a transfer of property for property.

For the above reasons, the transaction whereby Appellant obtained the property is within the generally accepted meaning of the word, "exchange". This transaction was either the giving of property "in consideration" for the return of shares representing property interests (*Dupont*, supra), or it was the cancellation of an obligation in return for the distribution of property (*Burger-Phillips Co.*, supra).

**b. Must "Basis" Be Bought?**

The District of Columbia Tax Court held the transaction involved in the case at bar to be unprovided for in the Tax Act. This decision resulted from that Court's interpretation of the *Berliner* case, supra, and from what the Tax Court believed to be required by the "science of taxation"—namely, that "basis" must be paid for, either by an initial purchase price, or by a tax paid on the receipt of the item involved. This conditioning of "basis" for the purposes of calculating the proper depreciation allowance, on the taxability of the transfer whereby the item depreciated was obtained, has no ground in the Tax Act nor in the cases.

On its face, Title XI of the Tax Act appears complete. Congress plainly intended that all means of obtaining depreciable property be included under section 6 [redacted] Otherwise, the language of Title III, Section 3(a)(7), and of the preamble to Title XI, Section 6, would not exclude all other reference in such plain terms. It must follow that all presumptions should be in favor of the achievement of that purpose.

Furthermore, depreciation "basis" has never been held to be tied necessarily to taxes paid on a transfer whereby depreciable property is obtained, except insofar as such "basis" requirement appears in the taxing statute itself. This is shown by the early cases interpreting the Internal Revenue Code of 1918. To be sure, taxability of a transfer was one consideration in the following cases, but never *the*, or even the *major* consideration.

*In Ford Motor Co. (Delaware)* v. *United States*, 47 F. Supp. 259, 97 C. Cls. 370 (1942), "plaintiff, being the owner of 100 percent of the stock of the Michigan corporation, liquidated this wholly owned subsidiary by surrendering all of its capital stock (except three qualifying shares) in exchange for all of its assets." The plaintiff claimed a "basis" for depreciation equal to the fair market value of the assets at time of distribution. The Commissioner of Internal Revenue, on the other hand, contended that such "stepped up" basis was not allowed, and that the proper "basis" was the amount originally paid by the liquidated company for the goods. The plaintiff won, the court noting that the transaction whereby the property was obtained did give rise to a tax, but stating that this was not the only consideration by which it came to its decision.

In *American Printing Company* v. *United States*, 53 F. (2d) 98 (D. Mass. 1931), the court held that the date-of-distribution value of assets distributed for stock, in liquida-

tion of a corporation, was the proper "basis" for depreciation. The court noted that the distribution did give rise to a tax but did not state that this was at all necessary to its decision. In fact, the court rested its decision totally on the nature of the transaction:

> It would appear that both Bureau and Board of Tax Appeals have recognized the principle that the right to a new basis for depreciation necessarily follows from the acquisition by a distinct . . . entity, in the absence of express statutory enactment prohibiting basis. (at 100)

The court further said that it could see no distinction between this case and one in which shares of other corporations were given for property. (ibid).

The 1918 Internal Revenue Code contained a provision granting an allowance for depreciation very similar to Section 3(a)(7), Title III, of the District of Columbia Tax Act. However, the 1918 Code contained no provision for the computation or determination of "basis" for depreciation. That being the case, the courts were free to use the "taxability" of a transfer to *aid* in the finding of such "basis" (but not to *determine* such "basis"). However, it should be further noted that the District of Columbia Tax Act of 1947, as amended, does contain an explicit direction as to the manner in which such "basis" is to be found, making the dicta with regard to "taxability" in the above cited cases irrelevant for purposes of this case.

The District of Columbia Tax Act of 1947 does not tie the determination of "basis" for depreciation to the "taxability" of the transaction whereby the depreciable property was obtained. In fact, "taxability" is a concept dealt with by an entirely different set of rules, and it is clear from the words of the statute that even a transaction which never gives rise to an income tax may give rise to a "stepped up" basis for the property involved. Such transactions are: gift, inheritance, capital-gain producing "ex-

change". There is no provision in the Act for "transferred basis" or "substituted basis" to compensate for nonrecognition of gain or loss, or for the exempt nature of the gain resulting from a transaction whereby property is received. Obviously, the Act is so arranged that there are many tax advantages involved. The District of Columbia Tax Court noted these things ruefully in its discussion of the case at bar (J.A. 30-33). This still does not suggest, however, that it is the judicial role to alleviate these "inequities". Justice Holmes' statement in *Superior Oil* v. *State of Mississippi*, 280 U.S. 390, 395-6, (1930) is still appropriate:

> The only purpose of the [taxpayer] here was to escape taxation ... The fact that it [taxpayer] desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you may go as close to it as you can if you do not pass it.

See also *Atlantic Coastline* v. *Phillips*, 332 U.S. 168, 172-3 (1947); *Commissioner of Internal Revenue* v. *Newman*, 159 F. 2d 848, 851 (2d Cir. 19 L. Hand, C.J. dissenting).

Taxes paid on gain, in an exchange of property, has no *necessary* place in the scheme of District of Columbia franchise and income taxes for purposes of determining the proper depreciation allowance. It is clear that the District of Columbia taxing statute does not reject the un-paid-for stepped-up "basis". The suggestion by the District of Columbia Tax Court, that this requirement is relevant to the determination of depreciation "basis", is, therefore, erroneous.

## CONCLUSION

The "basis" for depreciation of property is found in only one place in the District of Columbia Income and Franchise Tax Act of 1947, as amended—Title XI, Section 6. Furthermore, this "basis" is the only basis which is to be used for such purpose, according to the language of

Title III, Section 3(a)(7), and Title XI, Section 6. Furthermore, the "basis" provided for in Section 6 of Title XI is different in nature and purpose from any other "basis" provided in Title XI. Thus, concepts applicable to the determination of a proper "basis" for computing gain or loss, are not necessarily applicable to the determination of a proper "basis" for computing a depreciation deduction.

The section of the Tax Act which sets forth the rules for determining "basis" for computing depreciation deductions is divided into only four categories—property acquired by purchase; property acquired in an exchange; property acquired by gift or inheritance; and property acquired prior to January 1, 1939. A distribution, in liquidation of a corporation, of depreciable assets comes within the generally acknowledged meaning of property acquired by "exchange". There being no reason in tax law, or in the decisions of this Court for the exclusion of a corporate liquidation distribution from the category of "exchange" for purposes of determining a depreciation "basis" (especially in light of the inapplicability of the other categories in Section 6), the decision of the District of Columbia Tax Court must be reversed, and the property acquired by the Appellant by virtue of the Liquidation of General Realties, Inc., must be held depreciable on the basis of their fair market value on the date of their distribution to the Appellant.

GILBERT HAHN, JR.
944 Washington Bldg.
Washington 5, D. C.
*Attorney for Appellant*

*Of Counsel:*

AMRAM, HAHN AND SUNDLUN
944 Washington Bldg.
Washington 5, D. C.

## JOINT APPENDIX

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DISTRICT OF COLUMBIA TAX COURT

Docket No. 1904

OPPENHEIMER, BEATRICE W., *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

*Counsel:* Gilbert Hahn, Jr., Esq.
*Address:* 944 Washington Building
Washington 5, D. C.

### Docket

| Date | Proceedings | Memorandum |
|---|---|---|
| 1963 | | |
| Sept. 9 | —Petition filed—corporation counsel Finance Office, and Taxpayer served. | |
| | | Unincorporated Business Franchise Tax: 1960—$1,719.50 1961—$1,467.36 |
| Oct. 21 | —Hearing Set for November 20—Certificate of Service | |
| Nov. 20 | —Hearing—Henry E. Wixon, Esq., for Respondent. Stipulations | |
| Dec. 27 | —Petitioner's Brief—Certificate of Service | |
| 1964 | | |
| Feb. 5 | —Brief for Respondent—Certificate of Service | |
| Mar. 9 | —Stipulation | |
| Mar. 10 | —Stipulation | |
| Apr. 15 | —Petition for Review filed by Petitioner | |
| Apr. 17 | —Designation of Record—Certificate of Service | |
| May 7 | —Designation of Record—Certificate of Service | |

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1904

Beatrice W. Oppenheimer, 4000 Cathedral Avenue, N. W. Washington, D. C., *Petitioner*

v.

District of Columbia, *Respondent.*

**Petition**

The above-named Petitioner appeals from an assessment of unincorporated business franchise taxes against her, and avers as follows:

1. The Petitioner is an individual with residence at 4000 Cathedral Avenue, N. W., Washington, D. C.

2. The tax in controversy is an alleged deficiency in unincorporated business franchise taxes for the calendar years 1960 and 1961, in the amounts of $1,514.98, with interest of $204.52; and $1,364.99 with interest of $102.37, respectively; total: $3,186.86.

3. The alleged notice of assessment was dated April 19, 1963, Exhibit "$B_1$" and the tax, with interest, for each of the two years, was paid on July 11, 1963, as will appear from a copy of the bills, marked "Paid, 7/11/63" hereto attached as Exhibits "$A_1$", and "$A_2$"; a copy of the statement by the Tax Auditor, Finance Office, and a copy of the attached explanation of the deficiency, are attached hereto as Exhibits "$B_2$" and "$B_3$".

4. The payment made in response to the alleged notice of deficiency was protested by mail under date of May 10, 1963, a copy of which protest is attached hereto as Exhibit "C".

5. The assessment of the tax is based upon the following errors:

A. The assessor erred in disallowing the amount of depreciation taken by the Petitioner in the calendar

years 1960 and 1961 on certain property, consisting chiefly of rental units (apartment buildings) received by the Petitioner in exchange for her stock in a Delaware corporation on January 2, 1953, when that corporation was liquidated, to the extent the said property was not a "dividend".

B. The Assessor erred in giving to such property received by the Petitioner (not a "dividend"), in the liquidation of General Realties, Inc., the adjusted basis of said property in the hands of the Corporation as of January 2, 1953, which is not authorized in any section of the D. C. Income and Franchise Tax Law.

C. The Assessor erred in rejecting the assignment to such of the property (not a "dividend") received in exchange for stock, a basis equal to the fair market value of that property on January 2, 1953, and in not allowing depreciation for the calendar years 1960 and 1961 on the basis of fair market value on January 2, 1953, even though a basis of fair market value is authorized by Title XI, Section 6(b) of the District of Columbia Income and Franchise Tax Law of 1947, as amended, and deducting such depreciation on that basis is expressly allowed by Title III, Section 3 (a) (7) of the District of Columbia Income and Franchise Tax Law of 1947, as amended.

## FACTS

6. The facts upon which the Petitioner relies as a basis of this proceeding are as follows:

(A) General Realties, Inc., was a Delaware Corporation which was organized in 1930. The greater portion of the assets of the Corporation were transferred to it by its shareholders in return for capital stock of the Company. A smaller amount was contributed to the Company in 1936 when the shareholders purchased shares for cash. The only shareholders of

the Company were Elmer B. Young and Beatrice W. Oppenheimer (the Petitioner), each owning 50% of the capital stock of the Company.

(B) The Company was engaged in the business of renting residential property. Its assets consisted almost entirely of improved rental property, of the type commonly known as two-family flats and four-family flats, in the District of Columbia, all of which it had held for more than two years. The Company's balance sheet as of January 1, 1953, indicated total assets (at book value) of $600,698.67 and mortgages of $193,741.07 for a net book value of $406,957.60. The property at the date of distribution, January 2, 1953, had a net fair market value of $1,585,202.66.

(C) The Company was dissolved and its assets distributed in accordance with a plan of complete liquidation to take effect as of January 2, 1953. The assets of the Company were distributed to the two stockholders in complete liquidation of the Company. The real estate was divided between the two shareholders rather than conveying to them as tenants in common.

(D) The Company was completely liquidated in a tax-free transaction under Section 112 (b)(7) of the Federal Internal Revenue Code, then in force, whereby all assets of the Company were distributed to the two stockholders equally. Further, all the property received by the Petitioner was treated as an exchange for her stock in accordance with Section 115 (c) of the Federal Internal Revenue Code, then in force.

(E) In a prior case involving the same Petitioner and the same transaction, *Oppenheimer* v. *D. C.*, D. C. Tax Court 1709 (1961) and *D. C.* v. *Oppenheimer*, 301 F. (2d) 563 (1962), the transaction of January 2, 1953 was determined to be a dividend as to the distribution of $135,248.75 of assets and a distribution of appre-

ciated assets, without realization of income, in exchange for stock as to $707,265.20 of assets.

(F) The District of Columbia, asserting a deficiency therefore, has claimed that the basis of those depreciable assets distributed to the Petitioner not considered a dividend, in exchange for her stock, should on January 2, 1953 have had a basis (it is believed) of $31,127.25, the basis which those same assets would have had as the book value of the corporation on January 1, 1953; and that, consequently, those assets were fully depreciated prior to December 31, 1959 by reason of the annual deductions for depreciation taken by the Petitioner, during the years 1953-1959 inclusive.[1]

(G) Petitioner asserts that she took the proper basis for depreciation on those same assets, by using fair market value as the basis on January 2, 1953, as provided in Title XI, Section 6 (b) of the D. C. Income and Franchise Tax Law of 1947, as amended; and further, that she has taken proper annual rates of depreciation on such assets during each intervening year to and including the years ending December 31, 1960 and December 31, 1961.

(H) Since both that part of the assets distributed to the Petitioner (that is to say that part considered a "dividend" as well as that part amounting to an exchange of assets for stock, not amounting to a dividend) are treated alike: both may be set up in the hands of the stockholder receiving them at fair market value, Petitioner set up the buildings at $1,005,718.36

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[1] This was arrived at by assuming that the basis to be ascribed to the non-dividend property must bear the same relationship to the value of the depreciable assets on the books of the distributing corporation, after depreciation, as does the fair market value of the dividend distributed to the Petitioner, at the time of distribution, bear to the fair market value at that same time of all of the assets distributed to the Petitioner by the corporation. The District of Columbia has not made this clear in its deficiency explanation.

(their fair market value not reduced by mortgages) and the equipment at $80,358.50 (some of these sums represent additional costs since 1952, but the largest part is the original fair market value) and has depreciated these items in accordance with methods permitted by the District of Columbia since. The depreciation, together, on these items was the following for the years in question:

| | |
|---|---|
| 1960 | $37,874.23 |
| 1961 | 34,124.75 |

(I) The Petitioner received a 30-day notice of deficiency (Exhibit "$B_1$" herewith) under date of April 19, 1963, asserting that the examination of the Petitioner's unincorporated business franchise tax returns for the years ending December 31, 1960, and December 31, 1961, indicated that an adjustment of the Petitioner's tax liability was warranted. The letter was accompanied by a statement (Exhibit "$B_2$" hereto) that the proposed deficiency was $1,514.98 for 1960, and $1,364.99 for 1961. Protest was filed thereto May 10, 1963 (Exhibit "C" herewith). Hearing was had June 7, 1963. On July 9, 1963, the Assessor denied the protest, made assessment and rendered bills (Exhibits "$A_1$" and "$A_2$" herewith) for the alleged deficiency as follows:

| | | | |
|---|---|---|---|
| 1960 | Deficiency | $1,514.98 | |
| | Interest to July 15, 1963 | 204.52 | |
| | | | $1,719.50 |
| 1961 | Deficiency | 1,364.99 | |
| | Interest to July 15, 1963 | 102.37 | |
| | | | $1,467.36 |

and said amounts were paid by Petitioner July 11, 1963 (Exhibits "$A_1$" and "$A_2$" herewith).

Payment was made of the alleged deficiency on July 11, 1963, as will appear from "Taxpayer's copies" of the bill, marked "Paid 7/11/63" attached hereto as Exhibits "$A_1$" and "$A_2$".

(J) The assessment and payment of the alleged deficiency were duly protested by letter under date of May 10, 1963, a copy of which is attached hereto as Exhibit "C".

(K) The alleged deficiency was computed by eliminating all depreciation on the assets, not a dividend, exchanged for stock, taken for the years ending December 31, 1960 and December 31, 1961, adjusted for increased salary allowances as follows:

| | |
|---|---|
| 1960 | $ 7,574.85 |
| 1961 | 6,842.95 |

This resulted in a net increased taxable income in each year as follows:

| | |
|---|---|
| 1960 | $14,109.36 |
| 1961 | 9,829.51 |

WHEREFORE, Petitioner prays that this Court may hear the proceedings and grant the following relief:

1. That the Court cancel the Unincorporated Business Franchise Tax deficiency assessments and interest paid for the years ending December 31, 1960 and December 31, 1961, and direct the Respondent to refund to the Petitioner the sums of $1,719.50 and $1,467.36, respectively, with interest thereon as provided by law.

2. That the Court grant such other and further relief as the Court may deem proper.

BEATRICE W. OPPENHEIMER

GILBERT HAHN, JR., ESQ.
944 Washington Building
Washington 5, D. C.
STerling 3-3344
*Attorney for Petitioner*

COUNTY OF }
STATE OF CALIFORNIA } ss:

BEATRICE W. OPPENHEIMER, being duly sworn, says that she is the Petitioner above named; that she has read the foregoing Petition and is familiar with the statements contained therein, and that she verily believes the said statements are true.

BEATRICE W. OPPENHEIMER

SUBSCRIBED AND SWORN TO before me this day of , 1963.

*Notary Public*

My Commission expires:

[illegible]

**Exhibit Nos. $A_1$ and $A_2$**

$A_1$

COPY 1A — TAXPAYER'S COPY

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE • Revenue [illegible]on

INCOME [illegible]ND FRANCHISE TAX

| TYPE TAX | ACCOUNT NUMBER | REF. | TYPE TAX | TAX YEAR | DATE | |
|---|---|---|---|---|---|---|
| I - Individual Income<br>D - Declaration Payment<br>N - Corporation<br>J - Unincorporated Business<br>F - Fiduciary<br>E - Employer Withholding | [illegible] | | | [illegible] | [illegible] | |

| NAME AND ADDRESS | TOTAL TAX DOLLARS | TOTAL TAX CTS. | CREDIT DOLLARS | CREDIT CTS. | INTEREST TO | PAYMENT DUE DOLLARS | PAYMENT DUE CTS. |
|---|---|---|---|---|---|---|---|
| [illegible] | [illegible] | [illegible] | [illegible] | | [illegible] | | |

Interest on payment due at the rate of ½ of 1% per month or portion thereof must be added if not paid on or before the interest date shown on this bill. Late filing penalty is computed at 5% per month or portion thereof (maximum 25%), except type tax E which is a flat 25%.

Make check payable to D. C. TREASURER. Send check or money order to FINANCE OFFICE, REVENUE DIVISION, Municipal Center, Washington 1, D. C.

Your cancelled check is your receipt.

| | |
|---|---|
| Interest at rate of ½ of 1% per month or portion thereof from to | |
| TOTAL PAYMENT DUE → | |

FP-56 (9/60)

KEEP THIS COPY

Paid 7/11/63

$A_2$

COPY 1A — TAXPAYER'S COPY

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE • Revenue Di[illegible]

INCOME AND FRANCHISE TAX

| TYPE TAX | ACCOUNT NUMBER | REF. | TYPE TAX | TAX YEAR | DATE | |
|---|---|---|---|---|---|---|
| I - Individual Income<br>D - Declaration Payment<br>N - Corporation<br>J - Unincorporated Business<br>F - Fiduciary<br>E - Employer Withholding | [illegible] | | [illegible] | [illegible] | [illegible] | |

| NAME AND ADDRESS | TOTAL TAX DOLLARS | TOTAL TAX CTS. | CREDIT DOLLARS | CREDIT CTS. | INTEREST TO | PAYMENT DUE DOLLARS | PAYMENT DUE CTS. |
|---|---|---|---|---|---|---|---|
| [illegible] | [illegible] | [illegible] | [illegible] | | 7/15/63 | [illegible] | [illegible] |

Interest on payment due at the rate of ½ of 1% per month or portion thereof must be added if not paid on or before the interest date shown on this bill. Late filing penalty is computed at 5% per month or portion thereof (maximum 25%), except type tax E which is a flat 25%.

Make check payable to D. C. TREASURER. Send check or money order to FINANCE OFFICE, REVENUE DIVISION, Municipal Center, Washington 1, D. C.

Your cancelled check is your receipt.

| | |
|---|---|
| Interest at rate of ½ of 1% per month or portion thereof from to | |
| TOTAL PAYMENT DUE → | |

FP-56 (9/60)

KEEP THIS COPY

Paid 7/11/63

**Exhibit B₁**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

Finance Office:
Revenue Division

Certified Mail
Return Receipt Requested

Reply to:
Income and Franchise Tax Section
Room 2025, Municipal Center
300 Indiana Avenue, N. W.
Washington 1, D. C.

(SEAL)

April 19, 1963

Beatrice W. Oppenheimer
4000 Cathedral Ave., N. W.
Washington 16, D. C.

Re: File No. J/E 9844 (WRE)

The examination by this office of your income and/or franchise tax return(s) for the year(s) ended December 31, 1960 and 1961, indicates that the adjustment of your tax liability, as shown in the accompanying statement, is warranted.

IF YOU AGREE to the adjustment in tax as shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Interest will cease, as of date of assessment, upon payment of amount due to the D. C. Treasurer, within ten (10) days from date of assessment.

IF YOU DO NOT AGREE to the proposed adjustment, you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your

exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency in tax against you.

Should you fail to file either the enclosed form of waiver or a written protest with this office within the thirty-day period mentioned, final determination of your tax liability will be made and notice and demand will be sent you in accordance with the provisions of law applicable to the assessment and collection of income and/or franchise tax deficiencies.

Yours very truly,

BEN A. BARSKY
Ben A. Barsky
*Supervisory Tax Auditor*
*Income and Franchise Tax Section*

Enclosures:
Statement
Form of Waiver

FR-111 (Rev. 4/61)

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**Exhibit $B_2$**

File No. U/B 9844 (WRE)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE

Revenue Division

WAIVER OF HEARING AND REQUEST FOR IMMEDIATE ASSESSMENT OF DEFICIENCY IN TAX

The hearing provided for in Section 31 of the District of Columbia Income Tax Act of 1939 and/or Title XII, Section 5 of the District of Columbia Income and Franchise Tax Act of 1947 is hereby waived and consent is

given to the assessment of the following deficiency or deficiencies in tax:

taxable year ended December 31, 1960 in the sum of $1,514.98

taxable year ended December 31, 1961 in the sum of $1,364.99

taxable year ended ................ in the sum of $.......

amounting to the total sum of ....................$.......

together with interest thereon as provided by law.

NOTE: *Please Do Not Send Remittance Until Bill Has Been Rendered:*

BEATRICE W. OPPENHEIMER

(Taxpayer)

(Taxpayer)

(Address)

By

Date

NOTE: The execution and filing of this waiver with the Finance Officer of the District of Columbia will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 35 of the District of Columbia Income Tax Act of 1939, or under Title XII, Section 12 of the District of Columbia Income and Franchise Tax Act of 1947, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment or collection of the tax.

If this waiver is executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

**Exhibit $B_3$**

BEATRICE W. OPPENHEIMER
4000 CATHEDRAL AVENUE, N.W.
WASHINGTON, 16, D.C.

UNINCORPORATED BUSINESS FRANCHISE TAX FILE 9844 (WRE)

| Calendar Year | | 1960 | | 1961 |
|---|---|---|---|---|
| Net income reported | | $55,950.14 | | $62,351.47 |
| Plus unallowable depreciation* | | 37,874.23 | | 34,124.75 |
| Revised net income | | $93,824.37 | | $96,476.22 |
| Less: Salary for taxpayers services | $18,764.87 | | $19,295.24 | |
| Exemption | 5,000.00 | $23,764.87 | 5,000.00 | 24,295.24 |
| Revised net taxable income | | $70,059.50 | | $72,180.98 |
| Revised tax | | $3,502.98 | | $ 3,609.05 |
| Less: tax previously assessed | | 1,988.00 | | 2,244.06 |
| Deficiency | | $ 1,514.98 | | $ 1,364.99 |

* Depreciation on properties acquired in Liquidation of General Realties, Inc. disallowed. Basis (amount taxed as a dividend) was fully recovered in prior years.

Adjustment will be made on your individual income tax returns upon receipt of the signed waiver.

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**Exhibit C**

REGISTERED MAIL May 10, 1963
RETURN RECEIPT REQUESTED

Mr. Ben A. Barsky
Supervisory Tax Auditor
Income and Franchise Tax Section
Room 2025, Municipal Center
300 Indiana Avenue, N. W.
Washington 1, D. C.

Re: Your Ref. File No. U/B 9844 (WRE)
Beatrice W. Oppenheimer—Our File 1267.6

Dear Mr. Barsky:

Beatrice W. Oppenheimer acknowledges receipt of your Notice of Deficiency served April 19, 1963, giving a proposed notice of adjustment of her tax liability for the years ended as follows:

| | |
|---|---|
| December 31, 1960 | $ 1,514.98 |
| December 31, 1961 | 1,364.99 |

Beatrice W. Oppenheimer does not agree to the adjustments proposed in your said notice, and, accordingly and herewith, *protests* the proposed adjustments and any interest or penalties thereon. Her reasons for the protest are, generally, the following:

1. You have asserted that the only allowable base for depreciation is the fair market value of the "dividend" itself. (Title XI; Section 4 D. C. Tax Act.)

2. However, the property which taxpayer received was only, in part, a dividend. The rest of the property was received in exchange for other property. See *District of Columbia* v. *Oppenheimer,* 301 F. (2d) 563 (1962).

3. Title XI; Section 6 (b) D. C. Tax Act provides:

> "The bases used in determining the amount allowable as a deduction from gross income under the provisions of Section 3 (a) (7) of Title I of this Article shall be—
>
> (b) where the property was received in exchange for other property after December 31, 1938 the bases shall be the market value thereof at the time of such exchange."

4. Title XI; Section 6, D. C. Tax Act contains the entire reference in the Tax Act to bases for depreciation. No section, except Section 6 (b), appears applicable to property acquired in liquidation of a corporation. The transaction involved was clearly not: acquired by purchase; inherited or acquired by gift; or acquired prior to January 1, 1939. Further, Sections 1-5 of Title XI of the Tax Act clearly apply to bases for determining gain or loss.

5. Without waiving the prior argument, taxpayer also objects to the assertion that "Basis (amount taxed as a dividend) was fully recovered in prior years". If this implies that the District of Columbia had the right to shorten "the useful life" of the property by allocating the entire basis to years already passed, taxpayer objects

on the ground that the District of Columbia has no authority for this action.

6. Objection is made on such other grounds that may appear at the hearing.

Gilbert Hahn, Jr., is attorney-in-fact and makes record of the fact that he was advised that you are authorized to accept this protest signed by an attorney-in-fact instead of the taxpayer.

Very sincerely yours,

BEATRICE W. OPPENHEIMER

By ____________________
GILBERT HAHN, JR.
*Attorney-in-Fact*

GH:z

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**Exhibit D**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF GENERAL ADMINISTRATION

Finance Office:
Revenue Division

(SEAL)
July 9, 1963

Reply to:
Income and Franchise Tax Section
Room 2034, Municipal Center
300 Indiana Avenue, N. W.
Washington 1, D. C.

Beatrice W. Oppenheimer
4000 Cathedral Ave., N. W.
Washington, D. C.

Re: File No. U/B 9844 (WRE)

Dear Madam:

We have carefully considered all the information submitted in your case. It is our conclusion that the pro-

posed adjustments in your District of Columbia Unincorporated Business Franchise Tax liability for the calendar years 1960 and 1961, as set forth in our deficiency notice of April 19, 1963, are warranted.

Pursuant to Title XII, Section 5, of the District of Columbia Income and Franchise Tax Act of 1947, as amended, a final determination has been made and bills for the deficiency taxes, plus statutory interest, are enclosed.

Very truly yours,

BEN A. BARSKY
Ben A. Barsky
*Supervisory Tax Auditor*
*Income and Franchise Tax Section*

BAB/lmb
Enclosures
c/c Gilbert Hahn, Jr.

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**Opinion No. 1029**

Filed Apr. 9, 1964

DISTRICT OF COLUMBIA TAX COURT

Docket No. 1904

BEATRICE W. OPPENHEIMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

**Findings of Fact and Opinion**

The assessing authority assessed the petitioner deficiencies in income tax for the calendar years, 1960 and 1961, which were based upon, or were the result of the disallowance of deductions for depreciation of real properties owned by the petitioner, and formerly distributed to her by a corporation of which she was a stockholder upon its dissolution.

## FINDINGS OF FACT

1. The petitioner is an individual domiciled in the District of Columbia, and is the operator of the real estate here involved as an unincorporated business.

2. (a) The petitioner was a stockholder of General Realties, Inc. a Delaware corporation, which was dissolved on November 30, 1953. The paid-in surplus or capital in relation to the stock ownership of the petitioner was in the amount of $49,912.62.

(b) The earned surplus of the aforesaid corporation pertaining to petitioner's stock ownership at the date of dissolution was $135,248.75.

(c) There was distributed to the petitioner by the aforesaid corporation upon its dissolution assets in the net amount of $842,513.95, including several pieces of real property improved by buildings, and consisting of the following:

| | | |
|---|---|---|
| Cash | | $ 3,590.34 |
| Other Assets: | | |
| One-half of accounts receivable | | 13.13 |
| One-half of notes receivable | | 8,332.12 |
| One-half of interest in furniture and fixtures | | 8.93 |
| Prepaid insurance | | 2,055.28 |
| Prepaid loan costs | | 238.57 |
| Land (Fair Market Value) | $ 72,000.00 | |
| Buildings (Fair Market value) | 849,500.00 | |
| One-half interest in 1621 A St. S.E. (Fair Market Value) | 5,500.00 | |
| | 927,000.00 | |
| Less Mortgages Assumed | 98,724.42 | 828,275.58 |
| Total | | $842,513.95 |

(d) The unrealized appreciation of the property distributed in kind to the petitioner by General Realties, Inc. upon its dissolution was $657,352.58.

3.(a) In a proceeding in this Court, entitled *Beatrice W. Oppenheimer* v. *District of Columbia,* Docket No. 1709, in which the petitioning taxpayer was the same as the petitioning taxpayer herein, the petitioner claimed that the portion of the assets distributed to her by General Realties, Inc., which represented the unrealized appreciation of those assets, was not a dividend within the meaning of Section 4(m) of Title I of the District of Columbia Income and Franchise Tax Act of 1947, codified as Section 47-1551c(m) of the District of Columbia Code, 1961 Edition; and that the only portion of those assets that was a dividend was that represented by the earned surplus of the corporation amounting to $135,248.75.

(b) After a hearing and arguments of the parties this Court held in the aforesaid proceeding that the claim or contention of the petitioner was valid; that the correct amount of the dividend was $135,248.75; and ordered a refund of that portion of an income tax which had been assessed by the assessing authority of the District of Columbia for the calendar year, 1953, upon that portion of the distributed assets represented by the unrealized appreciation thereof (89 W.L.R. 565). Upon a review of the decision of this Court by the United States Court of Appeals for the District of Columbia Circuit the decision of this Court was affirmed (112 U.S. App. D.C. 239, 301 F. 2d 563, 90 W.L.R. 559).

(c) Upon the decision of this Court becoming final there was refunded to the petitioner that portion of the income tax for the calendar year, 1953, which had been assessed on that portion of the aforesaid distributed assets representing unrealized appreciation thereof.

4. Beginning with the calendar year, 1953, and for each year thereafter the petitioner, as the owner of an unin-

corporated business, has filed with the assessing authority of the District of Columbia franchise tax returns in which she reported the revenue received by her from the operation of the several pieces of real property distributed to her by General Realties, Inc. upon its dissolution. In computing the net income accruing from that operation as the measure of the franchise taxes the petitioner claimed that the basis for determining depreciation for deduction from gross income was the fair market value of the buildings or the distributed properties as of the date of the dissolution of the corporation, amounting to $849,500.00, which in part represented unrealized appreciation. Based upon that claim of basis, the petitioner in her computation of net income in the franchise tax return claimed and deducted from the gross income or revenue accruing from the operation of the real properties amounts of depreciation thereof and for the calendar years following:

| Year | Amount | |
|---|---|---|
| 1953 ........ | $83,825.00 | |
| 1954 ........ | 75,498.75 | |
| 1955 ........ | 64,340.23 | |
| 1956 ........ | 57,501.39 | |
| 1957 ........ | 51,797.89 | |
| 1958 ........ | 46,662.26 | |
| 1959 ........ | 42,038.09 | |
| 1960 ........ | 37,874.23 | |
| 1961 ........ | 34,124.75 | |
| Total | | $493,662.59 |

5.(a) The assessing authority of the District of Columbia on July 9, 1963, assessed the petitioner as the owner of an unincorporated business a deficiency in franchise tax for the calendar year, 1960, in the amount of $1,514.98, plus interest in the amount of $204.52, or a total of $1,719.50, and a deficiency in franchise tax for the calendar year, 1961, in the amount of $1,364.99, plus interest in the amount of $102.37, or a total of $1,467.36.

(b) The aforesaid deficiencies were computed as appears from the auditor's report following:

"UNINCORPORATED BUSINESS FRANCHISE TAX

| "Calendar Year | | 1960 | | 1961 |
|---|---|---|---|---|
| Net Income Reported | | $55,950.14 | | $62,351.47 |
| Plus Unallowable Depreciation* | | 37,874.23 | | 34,124.75 |
| Revised Net Income | | $93,824.37 | | $96,476.22 |
| Less: Salary | $18,764.87 | | $19,295.24 | |
| Exemption | $5,000.00 | 23,764.87 | 5,000.00 | 24,295.24 |
| Revised Net Taxable Income | | $70,059.50 | | $72,180.98 |
| Revised Tax | | $ 3,502.98 | | $ 3,609.05 |
| Less: Tax Previously Assessed | | 1,988.00 | | 2,244.06 |
| Deficiency | | $ 1,514.98 | | $ 1,364.99 |

"Depreciation on properties acquired in liquidation of General Realties, Inc. disallowed. Basis (amount taxed as a dividend) was fully recovered in prior years.

"Adjustment will be made on your individual income tax returns upon receipt of the signed waiver."

(c) The ground for the disallowance of the deduction for depreciation in the computation of the deficiencies involved was based upon the determination by the assessing authority that the correct basis for the deduction of depreciation was not the fair market value of the properties distributed, but was in an amount equal to the amount of the portion of earned surplus of General Realties, Inc. distributed by it to the petitioner which was held to be a dividend, and was in the amount of $135,248.75.

(d) The aforesaid deficiencies and interest were paid by the petitioner on July 11, 1963.

6. This case was filed on September 9, 1963.

## Opinion

This is a case of an attempt by a former stockholder of a corporation to establish a stepped-up depreciation basis of a portion of property which was distributed to her by the corporation upon its dissolution. In an earlier

case the portion involved had been determined not to be a taxable dividend under the District of Columbia Income and Franchise Tax Act of 1947, because the value thereof was not realized at the time of the distribution, that is to say, it represented unrealized appreciation. The petitioner as the owner of an unincorporated business, in reporting and computing net income as a measure of franchise taxes, claimed that the basis of the portion of the property, which she had received tax-free, was its market value at the time of its acquisition.

The taxing authority of the District of Columbia determined that the correct basis for the deduction for depreciation in computing net income as the measure of an unincorporated business franchise tax was that portion of the distributed assets which represented the earned surplus of the corporation, which had been determined to be a dividend and upon which an income tax had been assessed against the petitioner herein in relation to the dissolution of the corporation.

On January 2, 1953, and for some time prior thereto the petitioner was a stockholder of General Realties, Inc. hereinafter referred to as "the corporation". On that date it was dissolved and its assets were distributed to its stockholders. The petitioner's capital investment represented by capital stock, and sometimes called "earned surplus", amounted to $49,912.62. The portion of the earned surplus pertaining to the petitioner's stockholding, that is to say, one-half thereof, and which was in excess of her capital investment, amounted to $135,248.75. There was, however, distributed to the petitioner by the corporation the assets following:

| | | |
|---|---|---|
| "Cash | $ 3,590.34 | |
| Accounts receivable | 13.13 | |
| Notes receivable | 8,332.12 | |
| Furniture and fixtures | 8.93 | |
| Prepaid insurance | 2,055.28 | |
| Prepaid loan costs | 238.57 | |
| Land (Fair market value) | 72,000.00 | |
| Buildings (Fair market value) | 849,500.00 | |
| Undivided one-half interest in 1621 A Street, N. E. (Fair market value) | 5,500.00 | $941,238.37 |
| Less mortgages assumed | | 98,724.42 |
| Net assets distributed to petitioner | | $842,513.95" |

The legend "Fair market value" in the foregoing statement or tabulation of distributed assets is intended to express an estimate of market value of the real property distributed to the petitioner. Such value, however, was not realized. The unrealized increment of value of that property at the time of the dissolution of the corporation was $657,352.58. The remainder or balance of the value of the assets in the amount of $185,161.37 was represented by the capital investment or stockholding of the petitioner in the amount of $49,912.62 and the earned surplus of the corporation in the amount of $135,248.75.

In her income tax return for 1953 the petitioner reported as a dividend paid or distributed to her by the corporation upon its dissolution the amount of assets representing its earned surplus, namely, $135,248.75. She did not include the portion of distributed assets representing her stockholding or the portion reflecting unrealized appreciation. The assessing authority of the District determined that the total value of assets distributed to the petitioner amounting to $842,513.95, less her capital investment or stockholdings of $49,912.62, or the net amount of $792,601.33 was a dividend and taxable as such. Ac-

cordingly a deficiency in income tax was assessed against the petitioner.

In a proceeding in this Court, entitled *Beatrice W. Oppenheimer* v. *District of Columbia,* Docket No. 1709, and in which the petitioning taxpayer was the same as in this proceeding, the petitioner appealed from the assessment of the deficiency in income tax, claiming that the only taxable income received by her from the corporation upon its dissolution was the portion of the distributed assets representing its earned surplus in the amount of $135,248.75; and that the determination by the assessing authority that the portion of the assets reflecting unrealized appreciation thereof was a dividend, and the consequent assessment of a deficiency was erroneous. This Court held that the claim or contention of petitioner was valid; that the portion of the assets representing unrealized increment of value was not a dividend within the meaning of Section 47-1551c(m) of the District of Columbia Code; and that the deficiency should be refunded to the petitioner. On review by the United States Court of Appeals for the District of Columbia Circuit this Court's decision was affirmed, and the amount of the deficiency was refunded to the petitioner.

Upon acquiring the real estate from the corporation the petitioner continued, and still continues the operation thereof as an unincorporated business as defined in the District of Columbia Income and Franchise Tax Act of 1947 (Chapter 15, Title 47, D.C. Code). In her franchise tax return as an unincorporated business the petitioner reported the basis of the buildings distributed to her by the corporation to be the fair market value thereof at the date of distribution in the amount of $849,500.00 (without consideration of mortgages). The petitioner continued to use the stepped-up basis for the subsequent taxable years. Beginning with the calendar year, 1953, and for the subsequent years prior to the calendar year, 1960, the petitioner claimed in her franchise tax returns in computing

net income as a measure of franchise taxes due by her deductions from gross income for depreciation of the buildings distributed to her by the corporation in the amounts following:

| Year | Amount of Depreciation |
| --- | --- |
| 1953 | $83,825.00 |
| 1954 | 75,498.75 |
| 1955 | 64,340.23 |
| 1956 | 57,501.39 |
| 1957 | 51,797.89 |
| 1958 | 46,662.26 |
| 1959 | 42,038.09 |
| Total Depreciation claimed and allowed prior to 1960 | $421,663.61 |

In her franchise tax returns for the calendar years, 1960 and 1961, the petitioner in computing net income from the operation of the real properties deducted from gross income received amounts representing depreciation of the buildings thereon as follows: for the year 1960, $37,874.23, and for the year 1961, $34,124.75. The assessing authority disallowed the deduction for depreciation *in toto* on the grounds stated in the auditor's report following:

> "Depreciation on properties acquired in liquidation of General Realties, Inc. disallowed. Basis (amount taxed as a dividend) was fully recovered in prior years."

In accordance with the foregoing determination the assessing authority assessed deficiencies in franchise tax against the petitioner as an unincorporated business as follows:

| Year | Tax | Interest | Total |
| --- | --- | --- | --- |
| 1960 | $1,514.93 | $204.52 | $1,719.50 |
| 1961 | 1,364.99 | 102.37 | 1,467.36 |

While the assessing authority's concept of the appropriate basis is incorrect in some respects, the assessments must be sustained. Even under a correct basis for depreciation, the determination that there was no allowable deduction for depreciation for the years, 1960 and 1961, was proper, because with the correct basis for depreciation the petitioner for the years from 1953 through 1959 deducted amounts totaling far in excess of that basis, so that in 1960, and, of course in 1961, there was nothing left of that basis to be recovered. In that respect it is now appropriate that the Court state the reasons for that conclusion or opinion.

Several sections of the District of Columbia Income and Franchise Tax Act of 1947, as codified in the Code, should be examined and discussed. The first is Section 47-1551c (m) defining a dividend.[1] It is as follows:

> "The word 'dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus) whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon or after liquidation or dissolution of the corporation: *Provided, however,* That *in case of any dividend* which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this subchapter, the basis of tax to the recipient thereof shall be *the market value* of such property at the time of such distribution; * * *." (*Emphasis supplied.*)

1 A "dividend" is taxable under Section 47-1557a(a) D.C. Code, 1961 Edition.

The next section of the Code to be considered is Section 47-1583c. It is found in Title XI of the Income and Franchise Tax Act, entitled "Bases", and reads as follows:

> "*Bases*[2] *for dividends paid in property.* Where any property other than money is paid by a corporation *as a dividend,* the base to the recipient thereof shall be *the market value* of such property at the time of its distribution by such corporation." (*Emphasis supplied.*)

Before citing and discussing the third and last pertinent provision in the Code, it should be noted that the provision in Section 47-1551c(m) that the bases of tax shall be "the market value", and that in Section 47-1583c that the "base" (for all purposes) shall be "the market value" apply solely to those cases or instances wherein the property involved is distributed *as a dividend.* Such provision in Section 47-1551c(m) does not apply where the property distributed is not a dividend and not taxable as such. *District of Columbia* v. *Oppenheimer,* 112 U.S. App. D.C. 239, 301 F. 2d 563, 90 W.L.R. 559. The same is true in respect to the same provision in Section 47-1583c. *Expressio unuis, exclusio alterius.* If Congress had intended that the basis for property distributed by a corporation otherwise than a dividend should be "the market value", it could have eliminated the phrase "as a dividend", so that the phrase would have read *"where any property other than money is paid by a corporation"*.

The third section that must be considered is Section 47-1583e. It relates "bases used in determining the amount allowable as a deduction" for depreciation. It applies to four instances of acquisition, namely (a) *purchase,* (b) *exchange,* (c) *inheritance or gift* and (d) *acquisition prior to January 1, 1939.* The section reads as follows:

---

[2] Since the provision is without limitation, the basis is for both the determination of capital gain or loss and for depreciation purposes.

"*Depreciation.* The bases used in determining the amount allowable as a deduction from gross income under the provisions of section 47-1557b(a)(7) shall be—

"(a) where the property was acquired after December 31, 1938, by purchase, the basis shall be the cost thereof to the taxpayer;

"(b) where the property was received in exchange for other property after December 31, 1938, the basis shall be the market value thereof at the time of such exchange;

"(c) where the property was inherited or acquired by gift after December 31, 1938, the basis shall be that defined in subsection 47-1583(b)(3);

"(d) if the property was acquired prior to January 1, 1939, the appropriate basis set forth in subsection (a), (b), or (c) of this section shall be used: *Provided, however,* That the taxpayer may, at his option, use as the basis the market value of such property as of January 1, 1939;

"(e) the taxpayer may deduct in each taxable year only such amount of depreciation as was actually sustained during that year and such annual deduction shall be based upon the useful life of the property remaining after the date used by the taxpayer in establishing the valuation: *Provided, however,* That the allowance for depreciation actually sustained during any taxable year may not be increased by any depreciation of the property which was allowable as a deduction in any earlier taxable year: *And provided further,* That any basis so established may not be changed in a subsequent taxable year, unless written approval of the Assessor has been first obtained."

Section 47-1583e is of no help in solving the question here presented, since the catalog of incidents of acquisi-

tion does not include the receipt of property by a stockholder of a corporation distributed upon its dissolution, where that property is *not* a dividend, because it represents unrealized appreciation thereof. It is a *casus omissus,* unless the omission was due to the legal fact that the property had no value upon which depreciation could be computed; and, therefore, a provision relating to depreciation of such property is not necessary or required. The petitioner erroneously contends that subsection (b) Section 47-1583e, quoted above, and relating to "exchange" applies in this case, with the result that the basis for depreciation purposes of the non-taxable portion of the property distributed by the corporation is the fair market value at the time of acquisition. The basis for such contention is the claim by the petitioner that the distribution of the assets by the corporation upon its dissolution was an "exchange". Such a contention is without merit. *Berliner* v. *District of Columbia,* 103 U.S. App. D.C. 351, 354, 355, 258 F. 2d 651, 86 W.L.R. 456.

While it is true that Section 47-1557b(a)(7) grants "A reasonable allowance for exhaustion wear, and tear of property used in a trade or business" in the computation of net income arising therefrom, there is no provision in the Code or in any regulation of the Commissioners which provides specifically for the method or basis for determining the allowance for depreciation of property distributed to a stockholder by a corporation upon its dissolution, but which was not a dividend nor taxable as such, because it represented unrealized appreciation thereof.

Section 47-1557b(a)(7), to which reference is made in the preceding paragraph, provides that the allowance for depreciation shall be "as permitted by reasonable rules and regulations which the Commissioners are hereby authorized to promulgate". Moreover, in Section 47-1595 the Commissioners are directed to prescribe and publish regulations generally for the enforcement and administration of the Income and Franchise Tax Act (Chapter 15 of the

Code). The Commissioners, however, have not made any regulation relating specifically to property distributed to a stockholder by a corporation upon its dissolution which was not a dividend under the ruling in the *Oppenheimer* case, that is to say, where the property, or the portion thereof involved represented unrealized appreciation thereof, and, therefore, not taxable as a dividend. The regulations pertaining generally to the Income and Franchise Tax Act, adopted by the Commissioners, contain no provision relating to depreciation under any circumstances.

As far as property *paid as a dividend* is concerned, adequate provision is found in the Code for the determination of depreciation, namely upon "the market value" thereof (See Section 47-1583c. *Bases for dividends paid in property*). In this case that result can be accomplished by a determination that the proper basis of the property distributed is the stockholding of the petitioner, designated in the Act as "paid-in surplus", in the amount of $49,912.62, and the earned surplus of the corporation in the amount of $135,248.75, which was held to be the amount of the divident paid to her by the corporation in the *Oppenheimer* case.

It is a cardinal principle in the logic or science of taxation that a stepped-up, or change of basis is not permissible in cases of a non-taxable transfer. That principle is reflected in the rule in non-taxable reorganizations where the original basis is carried over to the newly acquired asset, or the basis of the transferor becomes the basis of the transferee, (See *Illinois Water Service Co.*, 2 T.C. 1200, 1219, 1220, 1221, 1222, 1223.) and in the cases of gifts where the basis of the donor becomes the basis of the donee. The one departure from the principle in Federal law is the case of acquisition by inheritance or will, where the basis is the market value at the time of death of the decedent. It might, however, be observed that serious doubts have arisen about the logical validity of that departure; and a movement is under way to change the basis

in such case to that of the decedent. Of course, Section 47-1583(b)(3) and subsection (c) of Section 47-1583e(a), in some instances departs from the recognized principle in respect to gifts and, to some extent to acquisition by inheritance, but such departure is out of line with the recognized principle; and, at any rate, has no application here.

Bearing in mind that for determining gain or loss from disposition or for the allowance of depreciation in computing net income the basis is the same, it is important to note that the petitioner herein in her brief in the earlier *Oppenheimer* case in support of her claim that the portion of the assets distributed to her by the corporation, which had no recognized value, was for that reason not a dividend, and, therefore, a non-taxable distribution, made the argument following:

> "Assume a corporation without earnings, profits or surplus *earned* by the corporation, distributes property in kind to stockholder of the market value of $1,000.00, which had a cost basis on the corporate books of zero. This is clearly not a 'dividend' to the stockholder as it is a distribution, *not* out of earnings, profits or surplus, *earned* by the corporation.
>
> "Assume further, that the stockholder sells the property in kind immediately for $1,000.00. The basis for the property in the hands of the stockholder is *not* $1,000.00, it is zero. There is a taxable gain of $1,000.00. Why is this so?
>
> "This is so because Title XI, Section 4 gives a so-called 'stepped-up basis' only to a recipient-stockholder who gets property 'paid as a *dividend'*. In the example given, the recipient-stockholder does not get a basis of $1,000.00 because he did not receive a *dividend.* Section 4 of Title XI says:
>
> "'(4) Where any property other than money is paid by a corporation *as a dividend,* the base to the

recipient thereof shall be the market value of such property at the time of its distribution by such corporation.' (Emphasis supplied.)

"Whether the recipient gets a *dividend* distribution or a *non-dividend* distribution of property in kind, Title XI, Section 4 gives consistent treatment.

"If the recipient-stockholder got a distribution of a *dividend* of $1,000.00 of property in kind, he must be allowed to resell it for $1,000.00 without a second tax.

"If the recipient-stockholder gets a *non-dividend* distribution of property worth $1,000.00, *not* taxable as a *dividend,* then recipient-stockholder realizes gain when he sells; because (in the language of Title XI, Section 4) the *distribution* was not 'paid by the corporation as a dividend'—hence the recipient-stockholder does not get a 'stepped-up basis'.

"Since Title XI, Section 4 does not apply to a *non-dividend* distribution, the basis of the sale of property in kind, in the example given, is governed by Title XI, Section 1:

> " 'The basis for determining the gain or loss from the sale . . . of property shall be the *cost* of such property . . . ." (Emphasis supplied.)

"There is therefore no inconsistency between Title XI, Section 4 and Petitioner's interpretation of Title I, Section 4(m). Quite the contrary, *only* our interpretation of Title I, Section 4(m) is consistent with the use of the word '*dividend*' in Title XI, Section 4."

The position taken by the petitioner in the earlier case was apposite and was a correct corollary to her claim that the portion of the distributed real propery representing unrealized increment of value was not taxable as a dividend, which, as above observed, has been judicially determined to be valid.

If the portion of property, which was distributed to the petitioner by the corporation upon its dissolution, had no realized or recognized taxable value at the time of distribution, it has not realized or recognized value for deduction of depreciation. The underlying reason why the distribution by a corporation of unrealized appreciation of property is not a dividend is because in the eyes or contemplation of law "unrealized" value is no value at all. The case is somewhat similar to the unrealized increase of value of an asset prior to its sale. It has to be sold before the value can be determined. The fruit must be shaken from the tree. With that in mind, it is appropriate to refer again to the sections of the Code dealing with the basis of property distributed as a dividend. In case of property, other than cash or stock, basis is treated in Sections 47-1551c(m) and 47-1583c. The former deals with "basis of tax" of the dividend, while the latter with "base", for determining gain or loss or depreciation. In both sections the "basis" or "base" is declared to be "the market value" at the time of the distribution. If, as the petitioner claimed in the earlier *Oppenheimer* case, and as has been determined judicially, the market value of the portion of the property involved was unrealized, or, in other words, zero in the process of assessment of an income tax on the dividend, it is zero for the determination of the allowance or non-allowance of a deduction for depreciation on the computation of net income as a measure of an unincorporated business franchise tax.

For the reasons stated the Court holds that the determination by the assessing authority of the District that the basis for depreciation allowance of the real property distributed by General Realties, Inc. to the petitioner, a stockholder, upon its dissolution was erroneous in that it did not include the capital investment of the petitioner, that is to say, the portion of the paid-in surplus of the corporation pertaining to her stockholdings.

The Court further holds that the correct basis for the determination of depreciation allowance was the amount of the petitioner's capital investment or portion of the paid-in surplus, that is to say, the amount of $49,912.62, plus the value of the portion of real estate distributed to her by the corporation that represented or reflected its earned surplus, which amounted to $135,248.75, less any portion thereof, of which the petitioner disposed since the acquisition thereof, and plus any subsequent capital improvements or additions thereto.

The Court further holds that upon the basis as above determined by the Court, the amount of depreciation deducted by the petitioner from gross income earned by her as an unincorporated business in her franchise tax returns prior to the calandar years, 1960 and 1961, exceeded the correct basis of the real estate involved, so that she was not entitled to deduct, or claim any further deduction for depreciation in the computation of net income as the measure of the unincorporated franchise taxes for the calendar years, 1960 and 1961; and that, for that reason, the deficiencies in franchise tax here involved were validly assessed and must be affirmed.

*Decision will be entered for respondent.*

Jo. V. Morgan
Jo. V. Morgan
*Judge*

---

Filed Apr. 9, 1964

**Decision**

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is, by the Court this 9th, day of April, 1964.

Adjudged and Determined, That a deficiency in unincorporated business franchise tax for the calendar year,

1960, in the amount of $1,514.98, plus interest in the amount of $204.52, or a total of $1,719.50, was validly assessed and collected from the petitioner and is hereby affirmed, and it is

FURTHER ADJUDGED AND DETERMINED, That a deficiency in unincorporated business franchise tax for the calendar year, 1961, in the amount of $1,364.99, plus interest in the amount of $102.37, or a total of $1,467.36, was validly assessed and collected from the petitioner and is hereby affirmed.

JO. V. MORGAN
Jo. V. Morgan
*Judge*

Findings of Fact, Opinion and Decision
Served as follows:

Gilbert Hahn, Jr., Esq.
Attorney for Petitioner
944 Washington Building
Washington 5, D. C. (Mailed 4/9/64)

Finance Officer, D. C. (Mailed 4/9/64)

Corporation Counsel, D. C. (Mailed 4/9/64)

PHYLLIS R. LIBERTI,
*Clerk*

---

Filed Apr. 15, 1964

**Petition for Review of a Decision of the District of Columbia Tax Court**

*To: The Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:*

1. Beatrice W. Oppenheimer petitions for a review by the United States Court of Appeals for the District of

Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above entitled case.

2. The decision of which review is sought affirmed an assessment of unincorporated franchise tax for the years 1960 and 1961.

3. The decision of the Tax Court was entered on April 9, 1964.

GILBERT HAHN, JR.
Gilbert Hahn, Jr.
944 Washington Building
Washington 5, D. C.
*Attorney for Petitioner*

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,639

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BEATRICE W. OPPENHEIMER,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

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ON PETITION FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

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CHESTER H. GRAY
Corporation Counsel, D.C.

MILTON D. KORMAN
Principal Assistant Corporation Counsel, D.C.

HENRY E. WIXON
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# QUESTIONS PRESENTED

Where General Realties, Inc., was liquidated, and its assets (both cash and other property, including the depreciable property which is the subject of this litigation) were transferred to its shareholders in proportion to their stock interest in the corporation, and where petitioner, one of the shareholders, received, among other assets, depreciable property which was subsequently used in a trade or business, in the view of respondent the questions presented are:

1. Is not the surrender of stock by a stockholder to a corporation in the process of liquidation merely an incident to the receipt by the stockholder of his pro rata share of the assets of the corporation, and not an "exchange" of his stock?

2. Is not the proper "basis" for depreciation of property received by a stockholder on dissolution of a corporation and subsequently used by him in his trade or business, the capital, paid-in surplus and earned surplus of the corporation represented in the property, rather than the fair market value of the property on the date of dissolution where such value exceeds the stockholder's pro rata share of the capital, paid-in surplus and earned surplus, as reflected on the books of the corporation at dissolution?

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## CASES CITED

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* Cases or authorities chiefly relied upon are marked by asterisks.

STATUTES CITED

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## OTHER AUTHORITIES

IN THE
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| DISTRICT OF COLUMBIA, Respondent. | ) | |

## BRIEF FOR RESPONDENT

## COUNTER-STATEMENT OF THE CASE

General Realties, Inc., a Delaware corporation which conducted its business in the District of Columbia, was dissolved on January 2, 1953, and its assets were transferred in kind to its stockholders, including the petitioner, in proportion to their stock interests in the corporation. The assets of the corporation consisted, for the most part, of several parcels of real property improved by buildings (J.A. 18, 22-23).

The fair market value of the property in kind plus cash and other assets received by petitioner on dissolution, less mortgages assumed by petitioner, was $842,513.95. The buildings received by petitioner had, on January 2, 1953, a fair market value of $849,500.00 (J.A. 18). A depreciation schedule based on this amount was adopted (J.A. 20).

Pursuant to D.C. Code § 47-1551c (m) the transaction was ultimately taxed to petitioner as a dividend distribution in the amount of $135,248.75. This amount represented petitioner's pro rata share of the "earnings, profits, or surplus (other than paid-in surplus)" of the corporation on the date of dissolution. The unrealized appreciation in the value of the assets distributed was not taxed as a dividend distribution. See District of Columbia v. Oppenheimer, 112 U.S.App.D.C. 239, 301 F.2d 563 (1962).

Respondent District of Columbia disallowed depreciation deductions taken on petitioner's buildings for the calendar years 1960 and 1961 in the respective amounts of $37,874.23 and $34,124.75. The deficiency tax assessments for 1960 and 1961 were respectively $1,514.98, plus interest of $204.52 for a total of $1,719.50, and $1,364.99, plus interest of $102.37 for a total of $1,467.36 (J.A. 20). The Tax Court concluded:

> " * * * that the correct basis for the determination of depreciation allowance was the amount of the petitioner's capital investment or portion of the paid-in surplus, that is to say, the amount of $49,912.62, plus the value of the portion of real estate distributed to her by the corporation that represented or reflected its earned surplus, which amounted to $135,248.75, less any portion thereof, and plus any subsequent capital improvements or additions thereto.
>
> "The Court further holds that upon the basis as above determined by the Court, the amount of depreciation deducted by the petitioner from gross income earned by her as an unincorporated business in her franchise tax returns prior to the calendar years 1960 and 1961, exceeded the correct basis of the real estate involved, so that she was not

entitled to deduct, or claim any further deduction for depreciation in the computation of net income as the measure of the unincorporated franchise taxes for the calendar years 1960 and 1961; and that, for that reason, the deficiencies in franchise tax here involved were validly assessed and must be affirmed." (J.A. 34.)

Petitioner Oppenheimer appeals from this decision of the Tax Court.

## SUMMARY OF ARGUMENT

The liquidation of a corporation involving the distribution of assets upon a surrender of stock is not, as such, an exchange, nor does the District of Columbia Income and Franchise Tax Act of 1947 contain any provision which states that amounts distributed in complete liquidation of a corporation are to be treated as though received in full payment in exchange for the stock. Therefore, the basis for depreciating property received in kind on a corporate liquidation is not governed by Title XI, Section 6 (b) of the Income and Franchise Tax Act (D.C. Code § 47-1583e (b) (1961) as the depreciable property was not received in an exchange.

Absent a statutory provision, the proper basis for depreciating property received on dissolution of a corporation, which property is subsequently used by the taxpayer in his trade or business, is the taxpayer's investment in that property. That investment would be the taxpayer's pro rata share of the capital, paid-in surplus and earned surplus reflected on the books of the corporation at dissolution, to the extent represented in the assets received by the taxpayer on dissolution. and used by him in his trade or business.

## ARGUMENT

I

The liquidation of a corporation involving the distribution of assets upon the surrender of stock is not an exchange.

Among the deductions from gross income allowed by Title III, Section 3(a) of the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code § 47-1557b (a) (1961) ) in computing net income is:

> "(7) Depreciation.—A reasonable allowance for exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * * The basis upon which such allowances are to be computed is the basis provided for in title XI, section 6, of this article."

Title XI, Section 6 (D.C. Code § 47-1583e (1961) ) provides in pertinent part:

> "Depreciation.—The bases used in determining the amount allowable as a deduction from gross income under the provisions of section 3 (a) (7) of title III of this article shall be—
>
> (a) where the property was acquired after December 31, 1938, by purchase, the basis shall be the cost thereof to the taxpayer;
>
> (b) where the property was received in exchange for other property after December 31, 1938, the basis shall be the market value thereof at the time of such exchange;
>
> (c) where the property was inherited or acquired by gift after December 31, 1938, the basis shall be that defined in subsection 1 (b) (3) of this title;

(d) if the property was acquired prior to January 1, 1939, the appropriate basis set forth in subsection (a), (b), or (c) of this section shall be used: Provided, however, That the taxpayer may, at his option, use as the basis the market value of such property as of January 1, 1939;

(e) * * *"

Petitioner admits, and respondent agrees, that subsections (a), (c) and (d) have no application under the facts as presented herein. The depreciable property was not acquired by purchase, inheritance or gift, nor was it acquired prior to January 1, 1939. It was acquired by petitioner in 1953 on dissolution of General Realties, Inc.

Petitioner contends that the depreciable property was received in an exchange as provided by subsection (b) and thus the basis for depreciation would be the market value at the time of the exchange. This conclusion is incorrect as " * * * a corporate liquidation as such involves a distribution of assets upon a surrender of stock, but there is no sale or exchange.[53] By statutory provision [i.e., federal statutory

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"53 That, at least, has been the Treasury Department's view.

"Thus, with respect to Sec. 201 (c) of the Rev. Act of 1924, the following explanation was given in Sen. Rep. No. 398, 68th Cong., 1st Sess., CB 1939-1, p. 266 (at p. 274): 'The existing law [i.e., Rev. Act of 1921] has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property which may be treated as a capital gain. The treatment of liquidating dividends

provision], however, amounts distributed in complete or partial liquidation of a corporation are treated as though made in partial or full payment in exchange for the stock." (Emphasis supplied; brackets added.) 3B MERTENS, LAW OF FEDERAL INCOME TAXATION § 22.97 at p. 387 (Zimet & Weiss Rev. 1958). For example, the Revenue Act of 1918 and the Revenue Act of 1924 (discussed in quoted footnote 53) stated that amounts distributed in complete liquidation of a corporation were to be treated as payment received in exchange for stock.[1]" Since 1924,

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under the bill is substantially the same as provided for in the Revenue Act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the Act and, furthermore, is the only method of treating such distributions which can be easily administered.' * * *" (Brackets added.)

---

1. Section 201 (c) of the Revenue Act of 1918, 40 Stat. 1059, states:

"* * * Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

See also Hellmich v. Hellman, 276 U.S. 233 (1928).

Section 201 (c) of the Revenue Act of 1924, 43 Stat. 255, states:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *"

Note that the Revenue Act of 1921 did not have a comparable provision. See Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 354-355, 258 F.2d 651 (1958), cert. denied 357 U.S. 937 (1958).

liquidations of corporations have been treated as exchanges of stock resulting in capital gains or losses." Rev. Rul. 57-243, CB 1957-1, p. 117. (Emphasis supplied.) Section 6 (b) of Title XI of the Income and Franchise Tax Act (D.C. Code § 47-1583e (b) (1961) ), upon which petitioner relies, states that for purposes of depreciation the basis of property received in an exchange shall be its market value at the time of the exchange. Section 6 (b) does not, nor does any other section of the Act, state that a corporate liquidation involving the distribution of assets upon a surrender of stock is to be treated as an exchange. As such, and in the absence of specific statutory language, there is no exchange.

Bingham v. Commissioner, 105 F.2d 971 (2nd Cir. 1939) presents an interesting parallel. X sold real estate to Y for cash plus four interest bearing promissory notes payable in four successive years. All notes were secured by a mortgage on the real estate. Y paid the first note and made a partial payment on the principal of the remaining notes with a portion of the interest accrued. After X had commenced foreclosure proceedings, a settlement was reached in which Y reconveyed the real estate to X in return for the cancellation of his debt represented by the unpaid notes and interest. One of the issues before the Court was whether the admitted loss on the transaction, computed by deducting the appraised value of the property from the amount due on the notes, was allowable as a capital loss or as a bad debt, a capital loss being a "deductible loss resulting from the sale or exchange of capital assets." The Court stated at p. 972:

"* * * One would not ordinarily speak of the surrender of a note to its maker as the sale of the note to him even though the surrender was for full consideration as when the amount due on it was paid in cash. Neither would such a transaction in the ordinary course of business be looked upon as an exchange of the note for the amount due upon it. ***"

"What may have been property in the hands of the holder of the notes simply vanished when the surrender took place and the maker received them. He then had, at most, only his own obligations to pay himself. *** There was, therefore, no sale of the notes to him in the ordinary meaning of the word and no exchange of assets for assets since the notes could not, as assets, survive the transaction. ***"

By analogy, the liquidation of General Realties, Inc., which involved the distribution of assets by the corporation upon the surrender of stock by the shareholders, including petitioner, was not an exchange. It was simply an exercise of the rights of the stockholders as evidenced by their stock certificates. Stock in a corporation represents the right of the shareholder to participate in the distribution of the earnings of the corporation and, usually, to share in the assets upon its dissolution. Parker v. Waller, 93 Ga. App. 253, 91 S.E.2d 302 (1956); see also Brooks v. Eschwege, 108 Ohio App. 567, 162 N.E.2d 897 (1957). There was, therefore, no exchange of assets for assets since the stock did not, as assets, survive the transaction. "Where a transfer of property takes place without the transferor's receiving anything of value for the property transferred, the transaction is not a sale or exchange." Helvering v.

Nebraska Bridge Supply & Lumber Co., 115 F.2d 288, 290 (8th Cir. 1940).

Lastly, the petitioner's contention that the depreciable property in question was received in an exchange is contrary to a conclusion reached by this Court in Berliner v. District of Columbia, 103 U.S.App.D.C. 351, 258 F.2d 651 (1958), cert. denied 357 U.S. 937 (1958). In Berliner, the Court, in discussing amounts distributed in complete liquidation of a corporation, said at pp. 354-355:

> "* * * Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924. We must therefore reject the taxpayers' contention that the transaction should be held to be an exchange, the gain from which is excluded from gross income by Section 47-1557a (b) (11)."

In conclusion, the proper basis for depreciating property received in kind on a corporate liquidation is not governed by Title XI, Section 6 (b) (D.C. Code § 47-1583e (b) (1961) ), as a corporate liquidation involving the distribution of property in kind upon a surrender of stock is not an exchange.

II

<u>The proper basis for depreciation of property received on dissolution of a corporation is the taxpayer's investment in that property, i.e., the property's allocable share of the capital, paid-in surplus and earned surplus reflected on the books of the corporation prior to dissolution.</u>

Section 3 (a) (7) of Title III of the Income and Franchise Tax Act (D. C. Code § 47-1557b (a) (7) (1961)) allows as a deduction from gross income in computing net income "A reasonable allowance for exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence***." Assuming that real property which has been received in kind on a corporate dissolution, and which is subsequently used in a trade or business, can be depreciated, absent a specific statutory provision governing proper basis for depreciation (a proposition which respondent agrees with), the proper basis is as determined by the Tax Court, i.e., "the petitioner's capital investment or portion of the paid-in surplus***plus the value of the portion of the real estate distributed to her by the corporation that represented or reflected its earned surplus *** less any portion thereof, of which the petitioner disposed since the acquisition thereof, and plus any subsequent capital improvements or additions thereto." (J.A. 34.)

Depreciation has been discussed as follows:

> "The proper allowance for exhaustion, wear and tear, including obsolescence, of property used in trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate) whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property in the business, equal the cost or other basis of the property. ***"

2 P-H 1964 Fed. Taxes ¶ 14,005; see also 4 MERTENS, LAW OF FEDERAL INCOME TAXATION §23.04 (Zimet & Diamond Rev. 1960). "The purpose of allowing depreciation is to create a fund to restore the property, to the extent of the investment of the taxpayer, at the end of its useful life. ***" 4 MERTENS, LAW OF FEDERAL TAXATION ¶ 23.04, footnote 32 at p. 12 (Zimet & Diamond Rev. 1960). See also Detroit Edison Co. v. Commissioner, 319 U.S. 98 (1943); Reisinger v. Commissioner, 144 F. 2d 475 (2nd Cir. 1944). There was distributed to petitioner, as a shareholder, on dissolution of General Realties, Inc., her pro rata share of the cash and other assets of the corporation, including the depreciable property (buildings) which is the subject of this litigation (see J.A. 18). The proper basis of depreciation of the buildings, in the absence of a controlling statute, would be the petitioner's investment in the buildings. Just prior to dissolution, petitioner's pro rata share of capital or paid-in surplus as reflected on the books of the corporation was \$49,912.62; of the earned surplus, \$135,248.75; for a total of \$185,161.37. (J.A. 18). This amount should be apportioned to the actual assets distributed on dissolution to determine, for purposes of deprecia-

tion, petitioner's investment in any or all of the assets distributed.[2] The fair market value of the assets received ($842,513.95) does not represent petitioner's investment in those assets.

In the first Oppenheimer case, the District argued both before the Tax Court and before this Court (District of Columbia v. Oppenheimer, 112 U.S. App. D.C. 239, 301 F. 2d 563 (1962)), albeit unsuccessfully, that, where property is distributed by a corporation out of its earnings, profits, or surplus, the distribution is a dividend and the tax upon that divident is based upon the total fair market value of the property whether the value exceeds, or is less than the stated earnings, profits, or surplus out of which the distribution is made. (See Brief For Petitioner And Joint Appendix in No. 16,472). The basis for the argument was that the intent to compute the tax on the fair market value of the property received, less capital investment was demonstrated by Title XI, Section 4 of the Income and Franchise Tax Act (D.C. Code §47-1583c (1961)), which states:

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2. The Tax Court allocated the total of $185,161.37 to the buildings at issue herein (J.A. 34). It did not apportion this total to all of the assets received on dissolution of the corporation—cash, other current assets, land, other buildings, and the buildings which are the subject of this litigation (see J.A. 18). Although respondent is of the view that this was error, it did not cross-appeal on the point because it believes that the Tax Court's rationale and general conclusions were correct. In any event, the disallowances of depreciation deductions would not be affected.

> "Where any property other than money is paid by a corporation as a dividend, the base to the recipient thereof shall be the market value of such property at the time of its distribution by such corporation."

and by Title I, Section 4 (m) of the Act (D.C. Code § 47-1551c (m) ), which states, in pertinent part:

> "* * * That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution * * *"

In its opinion, the Tax Court answered this contention by stating that "Section 4 does not, of course, apply where, as here, the distribution was not a dividend."[7] On appeal this Court affirmed the Tax Court. The same position has been reiterated by the Tax Court in its opinion in this case:

> "* * * it should be noted that the provision in Section 47-1551c (m) that the bases of tax shall be 'the market value', and that in Section 47-1583c that the 'base' (for all purposes) shall be 'the market value' apply solely to those cases or instances wherein the property involved is distributed as a dividend. Such provision in Section 47-1551c (m) does not apply where the property distributed is not a dividend and not taxable as such. District of Columbia v. Oppenheimer, 112 U.S. App.D.C. 239, 301 F.2d 563, 90 W.L.R. 559. The same is true in respect to the same provision in Section 47-1583c. Expressio unius, exclusio alterius. If Congress had intended that the basis for property distributed by a corporation otherwise than a dividend should be 'the market value', it could have eliminated the phrase 'as a dividend', so that the phrase would have read 'where any property other than money is paid by a corporation.' " (J.A. 27.)

Assume the following: X corporation was dissolved, Y, its sole shareholder, receiving on dissolution depreciable property. Y subsequently used this property in his trade or business. Prior to dissolution the earned surplus of the corporation was $90,000 and the capital account $10,000. The fair market value of the property was $500,000. The first Oppenheimer case established that the amount taxable as a dividend to the shareholder on dissolution was $90,000 (the earned surplus), and not as the District argued, $490,000 (the fair market value less capital return). According to petitioner, Y would be entitled to a basis of $500,000 (the fair market value including capital) for depreciation of this property, whereas Y's investment would be only $100,000 ($90,000 earned surplus plus $10,000 return of capital). If it be assumed that Y had obtained the same property by purchase for $100,000, the basis for depreciation under District law would be $100,000.

If petitioner's contention were to be accepted as it relates to assets received on dissolution, taxpayer Y in the first example would recover as an expense incurred through depreciation total deductions of $500,000, whereas in the second example, if the property had the same fair market value, Y would receive through depreciation total deductions of $100,000. Yet in neither case did Y, in fact, invest more than $100,000 in the depreciable property. As illustrated, not only is petitioner's premise unsound as a matter of District law, but it would lead to inequality of

treatment, and, if applied, might present questions concerning the validity of the law as it relates to deductions from gross income through depreciation allowance.

In Oppenheimer this Court held that the unrealized appreciation in the value of General Realties' assets was not realized by the corporation by sale or otherwise. The necessary corollary to this conclusion is that the stockholders who received these very same assets on dissolution of the corporation did not realize the appreciation either, as the dissolution was not an exchange. As the Tax Court stated in its opinion:

> "The position taken by the petitioner in the earlier case was apposite and was a correct corollary to her claim that the portion of the distributed real property representing unrealized increment of value was not taxable as a dividend, which, as above observed, has been judicially determined to be valid.
>
> "If the portion of property, which was distributed to the petitioner by the corporation upon its dissolution, had no realized or recognized taxable value at the time of distribution, it has no realized or recognized value for deduction of depreciation. The underlying reason why the distribution by a corporation of unrealized appreciation of property is not a dividend is because in the eyes or contemplation of law 'unrealized' value is no value at all. The case is somewhat similar to the unrealized increase of value of an asset prior to its sale. It has to be sold before the value can be determined. The fruit must be shaken from the tree. With that in mind, it is appropriate to refer again to the sections of the Code dealing with the basis of property distributed as a dividend. In case of property, other than cash or stock, basis is treated in Sections 47-1551c(m) and 47-1583c. The former deals with 'basis of tax' of the dividend, while the latter with 'base', for determining gain or loss or depreciation. In both sections the 'basis' or 'base' is declared to be 'the market value' at the time of the distribution. If, as the petitioner claimed in the earlier

*Oppenheimer* case, and as has been determined judicially, the market value of the portion of the property involved was unrealized, or, in other words, zero in the process of assessment of an income tax on the dividend, it is zero for the determination of the allowance or non-allowance of a deduction for depreciation on the computation of net income as a measure of an unincorporated business franchise tax." (J.A. 32-33.)

## CONCLUSION

It is respectfully submitted that the decision of the District of Columbia Tax Court in disallowing depreciation deductions in petitioner's tax return for 1960 and 1961 was correct and should be sustained.

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## STATUTES INVOLVED

Title I, Sec. 4 (m) of the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code § 47-1551c (m), (1961) ):

> "The word "dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: Provided, however, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That the word 'dividend' shall not include any dividend paid by a mutual life insurance company to its shareholders."

Title XI, Sec. 4 of the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code § 47-1583c (1961) ):

> "Basis for Dividends Paid in Property.—Where any property other than money is paid by a corporation as a dividend, the base to the recipient thereof shall be the market value of such property at the time of its distribution by such corporation."

Sec. 331 (a) (1), Internal Revenue Code of 1954, as amended:

> "Complete liquidations.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock."

ANSWER OF RESPONDENT DISTRICT OF COLUMBIA
TO "PETITION FOR REHEARING BEFORE THE FULL COURT."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,639



BEATRICE W. OPPENHEIMER,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE
DISTRICT OF COLUMBIA TAX COURT

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IN THE
UNITED STATES COURT OF APPEALS
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| | | |
|---|---|---|
| BEATRICE W. OPPENHEIMER, Petitioner, | ) | |
| v. | ) | No. 18,639 |
| DISTRICT OF COLUMBIA, Respondent. | ) | |

ANSWER OF RESPONDENT DISTRICT OF COLUMBIA
TO "PETITION FOR REHEARING BEFORE THE FULL COURT."

Contending that the decision of the Court in Snow v. District of Columbia, ______ U.S.App.D.C. ______, ______ F.2d ______, decided November 22, 1965, is at variance with the decision rendered in the above-entitled case on June 17, 1966, petitioner Oppenheimer seeks a rehearing of her case before the Court sitting *en banc*. But Oppenheimer and Snow involved dissimilar questions.

In Snow, the taxpayer purchased, for approximately $1,000,000, all of the outstanding stock of a corporation and, as the sole stockholder, immediately caused the corporation to be dissolved, transferring to himself all the assets and receiving therefrom $300,000 as a dividend. There was no appreciation in the value of the assets received, and the immediate question was the affect of this transaction upon the District taxable income of the taxpayer. Contrary to the contention of the District,

the Court held that although the taxpayer had, upon dissolution of the corporation, received a taxable dividend of $300,000, he sustained a deductible loss of $300,000 "when in the other part of the transaction he received $700,000 of assets in return for the surrender of stock for which he had paid $1,000,000 in cash."

The second point involved in Snow concerned the basis for the taxpayer's depreciation of an apartment building, the major asset transferred to him upon the dissolution. In deciding this question, the Court said that "we think that in this case a reasonable allowance is the proper proportion of the cost to Snow, which is the value of the stock he turned over for the property."

Petitioner Oppenheimer's case, however, is, unlike Snow, directed to the question whether she is entitled to a depreciation allowance based, not upon the cost to her of the property being depreciated, but upon the fair market value of the depreciable property she received upon dissolution of the corporation in which she owned stock, the cost of which to her was substantially less than the value of the assets she received upon dissolution.

Thus, the two cases are so dissimilar as to obviate any question of a conflict in the decisions thereof. It is respectfully

submitted, therefore, that the motion of petitioner for a rehearing en banc should be denied.

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MEMORANDUM FOR AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 18639

BEATRICE W. OPPENHEIMER, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

Petition for Review of a Decision of the
District of Columbia Tax Court

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UNITED STATES COURT OF APPEALS
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Petition for Rehearing En Banc

MEMORANDUM FOR AMICI CURIAE
IN SUPPORT OF PETITIONER'S
PETITION FOR REHEARING EN BANC

Amici curiae, John H. Verkouteren, Herman Oshinsky, Charles Oshinsky, William Oshinsky, Herman Fenichel, Bernard Margolius and Lilyan Margolius, by their attorneys, Albert E. Arent and Joel N. Simon, petition the Court, pursuant to Rule 26(a) of the Rules of this Court, to grant Petitioner a rehearing in this case and to grant such rehearing before the entire nine judges of the Court, en banc, and upon such rehearing and further consideration hereof to reverse the judgment of the District of Columbia Tax Court, and enter judgment in favor of Petitioner, and as grounds for this petition, Amici Curiae urge the following points:

## ARGUMENT

### THE BASIS FOR DEPRECIATION OF PROPERTY RECEIVED AS A LIQUIDATING DISTRIBUTION, WHERE THE UNDERLYING STOCK IS A CAPITAL ASSET, IS EQUAL TO THE FAIR MARKET VALUE OF THE DISTRIBUTED PROPERTY

General Realties, Inc. ("General Realties"), a Delaware corporation, was dissolved on January 2, 1953, and its assets were distributed to its stockholders in cancellation of their stock. The assets distributed to Mrs. Oppenheimer, who was a 50% stockholder, consisted of cash and other current assets and certain land and buildings. At the time of the liquidation, the land and buildings had a fair market value of approximately $920,000, which was substantially greater than General Realties' cost basis. In addition, General Realties had earned surplus at the time of liquidation of $270,000, one-half of which was reported by Mrs. Oppenheimer as a dividend. On these facts, a division of this Court (consisting of Danaher, Wright and McGowan, Circuit Judges) held, affirming the District of Columbia Tax Court, that (i) a corporate liquidation, to the extent attributable to unrealized appreciation in value of the corporate assets, is not an "exchange," and (ii) the depreciation basis for the property distributed in liquidation may not be determined by reference to the fair market value of the distributed property.

I. <u>For purposes of the D. C. Income Tax Act, a liquidating distribution consists in part of a distribution of earned surplus, which is taxable to the shareholders as a dividend, and to the extent of the balance is a distribution of property in exchange for stock, which is taxable to the shareholder if his stock is not a capital asset, but is not taxable if the stock is a capital asset.</u>

At the outset, we must candidly admit that the D. C. Income Tax Act is less than precise in its treatment of corporate liquidating distributions, and that there is no provision of the Act which is all-inclusive in its coverage. However, there are several pertinent provisions of the Act which directly bear upon this problem.

First, D. C. Code § 47-1557a(a) defines the term "gross income," for purposes of taxation, as including --

> . . . income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this subchapter, growing out of the ownership, or sale of, or interest in, such property; also . . . gains or profits, and income derived from any source whatever.

Second, D. C. Code § 47-1551c(m) defines the term "dividend" as --

> . . . any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation . . . and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: . . .

Finally, D. C. Code § 47-1557a(b)(11) provides a complete exemption from income tax for gains from the "sale or exchange of any capital

assets." D. C. Code § 47-1551c(e) defines a "capital asset" as any property, with certain exceptions not pertinent, "held by the taxpayer for more than two years."

1. Prior to this case, no decision of this Court had held that the portion of a liquidating distribution in excess of earned surplus was not received in exchange for the underlying stock.

In Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F.2d 651 (1958), cert. denied, 357 U.S. 937 (1958), this Court held that the specific language of D. C. Code § 47-1551c defining the term "dividend" was an override on the general language of D. C. Code 47-1557a, so that the shareholders of a liquidating corporation could not escape dividend taxation on the corporation's accumulated earnings by treating the liquidating distributions as a payment received in "exchange" for stock, and hence as an exempt capital gain. The effect of this Court's decision in Berliner was to treat a liquidating distribution under the D. C. Income Tax Act in exactly the same manner as such distributions were treated for Federal income tax purposes under the Revenue Act of 1921.[1/] Indeed, this Court's opinion in Berliner relied, in large part, upon cases decided under the Revenue Act of 1921 and earlier Acts to support its premise that, absent

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1/ See Part III, infra, for a more complete discussion of the treatment of liquidating distributions under Federal law.

a specific statutory directive treating liquidating distributions as payments in exchange for stock, such distributions constitute dividends to the extent of accumulated corporate earnings. Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 354, footnote 11.

The Berliner case cannot, however, be read as broadly establishing the principle that a liquidating distribution is not, under any circumstances, to be treated as having been received in exchange for the underlying stock. In Berliner the corporation itself had sold all of its assets before liquidating and its earned surplus immediately prior to liquidation was greater than the total amount of the liquidating distributions made to its shareholders. Thus, the entire liquidating distribution represented a distribution of accumulated corporate earnings and was, accordingly, a taxable dividend. It is apparent that Berliner does not purport to deal with a case where the amount of the liquidating distribution exceeds the accumulated earnings. Such a case must be decided by resorting to cognate principles of Federal law, which, in the absence of express provisions in the D. C. Income Tax Act, are controlling. District of Columbia v. Lewis, 109 U.S. App. D.C. 353, 288 F.2d 137 (1961).

This analysis of the import of the Berliner case has, in fact, been recognized by this Court in its recent decision in Snow v. District of Columbia, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 19233, November 22, 1965), where Judge Prettyman stated (slip opinion, pages 3-4):

The District says that in Berliner, supra, we specifically determined that receipt by a District taxpayer of a liquidating dividend upon corporate dissolution does not constitute a sale or exchange of his stock. We did not so hold. That opinion was meticulous in repeatedly pointing out that we were dealing with a distribution of earnings, an earned surplus. From the opening statement of the question presented, "whether amounts distributed in complete liquidation of a corporation, to the extent that those amounts * * * represent corporate earnings, are properly includible in the stockholders' gross income as a dividend", repeatedly throughout the opinion to the final sentence, " * * * to treat distributions in liquidation as dividends to the extent that earnings are included * * *", we iterated and reiterated that our subject was a distribution of earnings. More specifically, in Berliner we reasoned in part from the premise of the federal act of 1921. We said that under that act distributions in liquidation fell within the definition of a dividend "to the extent that they represented accumulated earnings." And we continued that the District statute contains virtually the same definition as did that federal statute, with the significant addition that Congress itself included a specific provision "that the term 'dividend' includes a distribution of earnings 'during, upon, or after liquidation.'" We continued: "Had Congress intended that such a distribution be treated as an exchange * * *." Obviously by "such" we referred to the subject immediately under discussion, which was "a distribution of earnings". A bit later we referred to the purposeful selection by Congress of "the method of taxing liquidating distributions of earnings as dividends." (Emphasis ours.) Berliner dealt with the distribution of earnings, clearly, emphatically and exclusively. And indeed that condition may have been a necessary one; a holding that the return to a stockholder of amounts paid in by him for issuance of his stock is a taxable dividend, i.e., income, might void whole sections of an income tax statute. (Emphasis supplied.)

2. <u>This Court's decision in the SNOW case held that the portion of a liquidating distribution in excess of earned surplus was received in exchange for the underlying stock.</u>

The Court's opinion in this case is directly in conflict with the earlier decision of a different division of this Court in <u>Snow</u> v. <u>District of Columbia</u>, <u>supra</u>, which unmistakably held that a liquidating distribution in excess of earned surplus was received in exchange for the underlying stock.

In <u>Snow</u>, the taxpayer purchased all of the stock in Lombardy, Inc., for $1,000,000. Immediately after this purchase, Lombardy, Inc., was liquidated and its assets, which had a fair market value of $1,000,000, were distributed to the taxpayer as its sole stockholder. Immediately prior to the liquidation, Lombardy, Inc., had earned surplus of $300,000. This Court held that to the extent of the corporation's $300,000 of earned surplus, the distribution resulted in a taxable dividend. However, this Court also held that the taxpayer was entitled to a loss deduction because, after reducing the liquidating distribution by the amount taxable to him as a dividend, he received only $700,000 of his original stock investment of $1,000,000.

Although the Court in <u>Snow</u> does not state in so many words that the $700,000 distribution in excess of earned surplus was in exchange for the taxpayer's stock, the exchange rationale permeates the entire opinion. First, the Court at great length distinguished the <u>Berliner</u> case by pointing

out that the no-exchange holding in Berliner applied only to the distribution of accumulated earnings. Second, the Court (slip opinion, page 7) stressed the fact that the stock of Lombardy, Inc., was not a capital asset because the taxpayer had held it for less than two years [D. C. Code § 47-1551c(e)], and therefore his loss was a fully deductible, non-capital loss. If the Court had not regarded this aspect of the transaction as an exchange, there would have been no need to stress the fact that the stock was not a capital asset. D. C. Code § 47-1557b(a)(4)(B) allows as a deduction from gross income any loss "incurred in any transaction entered into for the production . . . of income." Only capital losses, which result from the sale or exchange of capital assets, are non-deductible. See D. C. Code § 47-1557b(b)(6).

The Snow case is also significant because, in recognizing that a loss deduction may result from a liquidation, it serves as a touchstone for analyzing the effect on a shareholder of his receipt of the portion of a liquidating distribution which is not a dividend. A simple example will illustrate the problem. A purchases for $10,000 all of the stock of X Corporation, which has as its sole asset land then worth $10,000. X corporation has, at the time of the purchase, earned surplus of $1,000. One year later, when the land is worth $20,000, because of rezoning during the interim, X Corporation is liquidated and the land is distributed to A. Assuming that X Corporation's earned surplus at the time of liquidation

is still $1,000, the liquidating distribution results in a dividend to A of $1,000. However, in addition to the $1,000 dividend, A has also received in the liquidation other property worth $19,000, while his stock basis is only $10,000. Just as in Snow, where the taxpayer was entitled to a loss deduction of $300,000 because the $700,000 non-dividend distribution was less than his $1,000,000 stock basis, the conclusion is inescapable that in the above example A realizes $9,000 of income because he received a non-dividend distribution of $19,000 and had only a $10,000 basis for his stock. The Snow case itself demonstrates the correctness of this analysis:

> It has been suggested that the distribution of corporate assets in return for the corporate stock, i. e., a corporate liquidation, is not a "tax event", meaning that no tax effect flows from such an action. But the argument will not withstand examination and, if sustained, would, it seems to us, greatly embarrass the tax authorities. Surely the District would impose a tax upon a gain derived from such a transaction. If Snow had paid only $500,000 for the stock, surely the District would urge that when he received $700,000 for that stock he owed a tax on $200,000. Indeed its counsel admitted as much in oral argument. The statute neither states nor implies a different disposition of non-capital gains and non-capital losses in the computation of taxable net income. Under the statute, if a non-capital gain is to be included in net income in a certain transaction, a loss upon the same sort of transaction is to be included in the computation. (Footnote omitted.) Snow v. District of Columbia, supra (slip opinion, pages 7-8).

The above example, of course, assumed that A held his stock in X Corporation for less than two years, so that the stock did not qualify as

a capital asset. If, however, A held the stock of X Corporation for more than two years before the liquidation, the effect of the liquidation on A would be considerably different, and it is this difference which puts the problem of the Oppenheimer case in proper perspective and emphasizes the illogic of the Oppenheimer opinion. If, in the above example, A had held his stock for more than two years, the liquidating distribution would still result in a dividend to A to the extent of the corporation's earned surplus of $1,000. However, the $19,000 non-dividend portion of the liquidating distribution would not result in any taxable gain to A, even though it exceeded his $10,000 stock basis, because A's stock, having been held for more than two years, would be a capital asset and this gain (i.e., the excess of $19,000 over $10,000) would be received by A in exchange for his stock and would, therefore, be an exempt capital gain.

We recognize that there is no decided case directly so holding, but we believe that this result inexorably follows from the reasoning in the Snow case. Thus, there appears to be no doubt that if the taxpayer in Snow had not liquidated the corporation immediately after purchasing the stock, but had instead waited for more than two years to do so, his loss would not have been deductible because the underlying stock would have become a capital asset. Likewise, if in the hypothetical gain case discussed in Snow, which is quoted above, the liquidation occurred more than two years after purchase of the stock, the gain would be an exempt capital gain.

Moreover, we believe that our analysis of the exempt capital gain that results from the non-dividend portion of a liquidating distribution where the underlying stock is a capital asset, has _in practice_ been recognized by the District of Columbia in the position it has consistently taken in the numerous liquidation cases that have been involved in litigation since _Berliner_. There has been no reported decision in a liquidation case in which the District of Columbia has ever attempted to impose a tax on the gain attributable to the excess of the non-dividend part of a liquidating distribution over the shareholder's stock basis, where the underlying stock was held for more than two years. See, for example, _Verkouteren_ v. _District of Columbia_, 120 U.S. App. D.C. 361, 346 F.2d 842 (1965); _Alper_ v. _District of Columbia_, 120 U.S. App. D.C. 364, 346 F.2d 845 (1965). Even in the celebrated "first" _Oppenheimer_ case,[2/] the District of Columbia did not argue for taxation at the shareholder level on this basis. In the first _Oppenheimer_ case, this Court rejected the argument that the unrealized appreciation in value of a corporation's assets was realized _by the corporation_ when it made a liquidating distribution. Since the unrealized appreciation in value was not realized _by the corporation_, it could not be included in the corporation's earned surplus and taxed to the shareholders as a _dividend_. The first _Oppenheimer_ case does _not_ stand

2/ _District of Columbia_ v. _Oppenheimer_, 112 U.S. App. D.C. 239, 301 F.2d 563 (1961).

for the proposition that the unrealized appreciation in value is <u>not</u> realized by the shareholders upon their receipt of the liquidating distribution.

On the contrary, since a corporation and its shareholders are separate and distinct taxable entities, it is a fundamental principle that in a corporate liquidation a shareholder does <u>realize</u> income (or gain) measured by the excess of the fair market value of the property received over the cost basis for his stock. Treas. Regs. § 1.331-1(b); Treas. Regs. § 1.1001(a). Bittker, Federal Income Taxation of Corporations and Shareholders (1959), Sec. 9.01, <u>et seq</u>. In addition, a contrary holding would be inconsistent with the D. C. Income Tax Act, D. C. Code § 47-1557a, which defines "gross income" as including "income derived from any source whatever." In this regard, it is significant to note that the United States Supreme Court, for analogous purposes of the Federal tax laws, has held that the term "gross income" was intended "to bring the taxing power to bear upon all receipts constitutionally taxable." <u>Commissioner</u> v. <u>Glenshaw Glass Co.</u>, 348 U.S. 426, 433 (1955).

The purpose of this discussion has been to demonstrate that, as recognized by this Court in <u>Snow</u>, under a proper analysis of the D. C. Income Tax Act a liquidating distribution consists of two separate and distinct parts.[3/] The first part is the part of the distribution which is treated as

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3/ In <u>Snow</u> v. <u>District of Columbia</u>, <u>supra</u>, this Court stated (slip opinion, page 6): "Distributions by a corporation may be (1) from its earnings, (2) from an increased value of its assets or some of them, or (3) a
(Cont'd. on p. 13)

a dividend. It is determined solely by reference to the accumulated earnings of the corporation immediately prior to liquidation. The second part of the distribution is the part representing a sale or exchange of the underlying stock, and consists of the remainder of the liquidation proceeds. With respect to the former, the recipient stockholder reports a dividend and pays a tax thereon. But as to the latter, since this part is received in exchange for the underlying stock, any gain realized by the stockholder in excess of the cost basis for his stock is a capital transaction and, if he has held his stock for more than two years, the gain will qualify as a capital gain and be exempt from the D. C. Income Tax. This result, as applied to the instant cases, is implicit in the fact that while Mrs. Oppenheimer received property worth $920,000 as a liquidating distribution, the District sought to impose a tax only on the amount of the distribution which represented a dividend. As a result of the liquidation, she received property worth $920,000, surrendered capital stock having a cost basis of $49,900, but was taxed on only a dividend equal to her one-half share of

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3/ (Cont'd.)

return to stockholders of that which they had put into the venture. The first two are gains to the stockholder, separated from the body of his investment by the act of distribution. The third is not a gain but is a return of what the stockholder already had, and so is not income. These principles have been prodigiously productive of litigation."

the corporation's earned surplus. The only explanation for not taxing Mrs. Oppenheimer upon the excess of the amount received as a liquidating distribution over the amount of the distribution treated as a dividend is that such excess was received in exchange for the underlying stock. Since she had held the underlying stock for more than two years, it was a capital asset [D. C. Code § 47-1551c(e)] and the gain resulting from an exchange of her stock was an exempt capital gain [D. C. Code § 47-1557a(b)(11)].

II. Where a liquidating distribution in excess of earned surplus is made with respect to stock which is a capital asset, the policy of the D. C. Income Tax Act exempting capital gains from taxation requires that the shareholder's basis for the distributed property be equal to its fair market value.

The preceding discussion demonstrates that the evident scheme of the D. C. Income Tax Act is to treat a liquidating distribution as a dividend to the extent of the corporation's earned surplus, and as an amount received in exchange for the underlying stock as to any balance. The balance of the distribution should, therefore, qualify as an exempt capital gain under the D. C. Income Tax Act if the underlying stock was held for more than two years.

The D. C. Income Tax Act manifests an express policy of exempting gains arising from the sale or exchange of investment property which is held for more than two years. Thus, D. C. Code § 47-1557a(b)(11) provides that gross income does not include "(g)ains from the sale or exchange of any capital assets as defined in this subchapter," and D. C.

Code & 47-1551c(e) defines a "capital asset" as any property, with certain exceptions not material, "held by the taxpayer for more than two years."

Where property is received by a taxpayer in a liquidating distribution in which a part of the distribution is treated as a payment in exchange for the underlying stock, a subsequent sale of the property received should not result in a taxable gain. Similarly, the taxpayer's depreciation basis for the distributed property should be equal to its fair market value at the time of the liquidation. In either case, this result is required by, and consistent with, the policy expressed in the D. C. Income Tax Act of exempting capital gains. A contrary result would undermine this policy by treating the stockholder's capital gain on liquidation -- which the D. C. Income Tax Act states is exempt -- as merely being deferred until such time as the stockholder subsequently sells the property received or, instead of selling the property, holds it for investment purposes.

The interrelationship between the policy of capital gain exemption and the problem of basis can best be illustrated by analyzing the facts of the Oppenheimer case, first in terms of a sale of the distributed property, and second in terms of the question of depreciation.

At the time of the liquidation of General Realties, Mrs. Oppenheimer had a cost basis for her stock of $49,900, while her share of the corporation's earned surplus was $135,000. As a result of the liquidation, Mrs. Oppenheimer received property with a fair market value of $842,000, of

which $135,000 -- the amount of her share of the corporation's earned surplus -- was taxable as a dividend, $49,900 was a return to her of her original investment in the corporation, i.e., her stock basis, and $657,100 was her share of the appreciation in value of the corporation's assets. Snow v. District of Columbia, supra (slip opinion, page 6). As we have already demonstrated, this $657,100 amount represented a gain realized by Mrs. Oppenheimer from an exchange of her stock. Since she had held her stock in General Realties for more than two years, this gain was a capital gain and, as such, was not required to be included in her gross income. In other words, Mrs. Oppenheimer's capital gain was exempt from tax.[4/]

Assume that shortly after the liquidation of General Realties, Mrs. Oppenheimer decided to sell the assets she received upon the liquidation for $842,000, an amount equal to their fair market value at the time of the liquidation. At this point, in determining the D. C. income tax consequences of Mrs. Oppenheimer's sale, it becomes necessary to consider what was meant when it was concluded that her $657,100 gain on liquidation was exempt. First, it is clear that the $842,000 received by Mrs. Oppenheimer on the sale of the assets represented the $135,000 reported

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4/ "Income which is not includable in gross income obviously is 'wholly exempt'." Hawaiian Trust Company Limited v. United States, 291 F.2d 761, 772 (9th Cir. 1961).

as a dividend on the liquidation, her $49,900 cost basis for her General Realties stock and the $657,100 exempt capital gain. Second, it should be equally clear that if her sale of the assets for $842,000 results in a taxable gain to her of $657,100 -- as the District has contended in cases involving sale, e.g., Verkouteren v. District of Columbia, supra -- her exempt capital gain is really not exempt at all. Instead, she has merely been accorded the privilege of postponing the recognition of her gain on liquidation until the later sale of the assets. Not only does this result do violence to the idea that her $657,100 gain on liquidation is exempt, but it also ignores the hitherto well-defined distinction between gain which is exempt and gain which is merely non-recognized. In Hawaiian Trust Company Limited v. United States, 291 F.2d 761, 773 (9th Cir. 1961), the Court stated:

> There is a valid distinction between "wholly exempt" income and income on which "no gain or loss is recognized". Wholly exempt income is never taxed. Nonrecognized gains are not taxed in the particular transaction that qualifies for non-recognition treatment. They may be taxed, however, if the transaction fails to meet the nonrecognition requirements and may also be taxed at another time. In other words, they are not "wholly exempt" from the tax.

See also, Cotton States Fertilizer Co., 28 T.C. 1169 (1957).

The concept of a non-recognized gain is also found in other parts of the D. C. Income Tax Act.[5/] Therefore, it is not unreasonable to conclude that when Congress specified that capital gains should not be included in gross income, it intended that such income should be exempt. It did not intend merely that the recognition of that income would be deferred until such time as the property was sold, because if it had so intended it could easily have provided for this result as it did in other cases where that was its intention. It must, therefore, be concluded that since the clear intention of the D. C. Income Tax Act is to exempt capital gains, this policy will be frustrated if an immediate resale by the shareholder results in that same gain being subjected to tax. It was apparently in recognition of this fact that the District of Columbia conceded in its brief in the celebrated "first" Oppenheimer case, that, in a case similar to the sale example, if "the property [received on liquidation] is sold immediately on receipt by the respondent [the stockholder of the distributing corporation] for its market value no gain will exist for District tax

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5/ See D. C. Code § 47-1583b which provides: "When in connection with the reorganization of a corporation, a taxpayer receives, in place of stock or securities owned by him, any stock or securities of the reorganized corporation, no gain or loss shall be deemed to occur from the exchange until the new stock or securities are sold or realized upon and the gain or loss is definitely ascertained, until which time the new stock or securities received shall be treated as taking the place of the stock or securities exchanged . . ."

purposes."[6] It seems to us that, in making this fundamental concession, the District has itself recognized that a fair market value basis must follow as a complement to an exempt capital gain.

It is, therefore, submitted that the liquidating distribution received by Mrs. Oppenheimer from General Realties resulted in an exempt capital gain to the extent it exceeded General Realties' earned surplus, and that the only way, consistent with the underlying policy of the D. C. Income Tax Act, in which complete exemption may be given to such gains would be for this Court to hold that no taxable gain would be realized upon a subsequent sale of the assets received upon liquidation for an amount equal to the fair market value of those assets at the time of liquidation.

We further believe that the rationale of the sale example applies with equal force where the question involves depreciation basis rather than basis for sale. Aside from the obvious administrative inconvenience -- to taxpayers and the District alike -- of having to account for different bases for depreciation purposes and sale purposes, depreciation basis is also integrally related to, and dependent upon, the capital gains exemption.

The actual facts of this case were that Mrs. Oppenheimer did not sell the distributed property, but continued to hold it as an investment. This fact, however, should not produce a different result than the sale

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6/ Brief for Petitioner, Docket No. 16,472, p. 10.

case. If Mrs. Oppenheimer's exempt capital gain of $657,100 is not included in her basis for depreciation, the result will be that in each year she will be required to include in her gross income a portion of the exempt capital gain equal to the excess of the depreciation deduction that would be allowed if the exempt capital gain was included in her basis over the amount of the depreciation deduction allowable without such inclusion. For example, if it is assumed that the depreciable property has a useful life of 30 years and depreciation is computed on the straight line method, the annual depreciation deduction would be approximately $28,000 based upon a depreciation basis of $842,000 (the fair market value of the distributed property, including the exempt capital gain), but would be only $6,100, based upon a depreciation basis of $184,900 (the sum of original stock basis and earned surplus, and not including the exempt capital gain). Therefore, in each year after the liquidation Mrs. Oppenheimer would be taxed on additional income of $21,900 [$28,000 - $6,100]. The amount of this difference would also be equal to 1/30th of the $657,100 exempt capital gain. By the end of the property's 30-year useful life, Mrs. Oppenheimer would be left with a fully depreciated building that was worth only its value as scrap -- and might even have a negative economic value because of the cost of demolition. But over the same 30-year period she would have been subject to taxation -- year by year -- on the entire $657,100 exempt capital gain. This result is certainly inconsistent with the policy of the D. C. Income Tax Act which exempts capital gains from tax.

In his opinion in this case, Oppenheimer v. District of Columbia (No. 18639, June 17, 1966), Judge McGowan (with whom Judge Wright concurred) refused to hold that any portion of a corporate liquidating distribution involved an exchange within the meaning of the D. C. Income Tax Act. The only reason given by Judge McGowan in reaching this conclusion was his belief that the Federal income treatment of liquidation as an exchange was not controlling and his feeling that any other result would permit "a stockholder, simply by deciding to dissolve and liquidate the corporation, . . . [to] acquire a depreciation base consisting of a book write-up of a value on which, very properly, no tax need be paid upon its receipt by the stockholder" (slip opinion, page 7). But as we have already demonstrated, the result which Judge McGowan refused to approve is precisely the result contemplated by the capital gains exemption contained in the D. C. Income Tax Act. Where the underlying stock has been held for more than two years so that the gain on the liquidation qualifies as an exempt capital gain, this exemption can be meaningful only if the distributed property obtains a fair market value basis for purposes of depreciation and sale. Otherwise, the shareholder will, instead of enjoying an exemption required by the statute, be given only a temporary non-recognition, with the gain being taxable at some future time when he sells the distributed property or with the gain being taxable -- year by year -- if he continues to hold the property as an investment.

In conclusion, we believe that the overriding policy of the D. C. Income Tax Act exempting capital gains from taxation requires that the basis for depreciation and sale of property received in a liquidating distribution be equal to its fair market value. Only in this manner can the statutory proscription exempting capital gain be given economic significance in the shareholder's subsequent dealings with the distributed property. Any other result would destroy the very purposeful Congressional policy decision to exempt capital gains from tax.

III. The provisions of the D. C. Income Tax Act should be construed in accordance with the related provisions of the Federal income tax laws which, since 1924, have treated amounts distributed in liquidation as received in exchange for the underlying stock.

We start with the premise that the D. C. Income Tax Act was created in the shadow of its Federal counterpart. This Court has repeatedly held that the rulings and interpretations of related Federal income tax laws should be applied in interpreting cognate provisions of the D. C. Income Tax Act. District of Columbia v. Lewis, supra. Since 1918 the Federal income tax laws have always treated a corporate liquidating distribution as an amount received in exchange for the underlying stock, and thus a capital transaction, either in its entirety or at least to the extent that the liquidating distribution exceeded the distributing corporation's earnings and profits.

The history of the early Federal income tax laws illustrates the controversy that existed regarding the proper theory upon which to proceed

in taxing shareholders upon their receipt of property following a complete corporate liquidation. From the point of view of the shareholders, the exchange of stock in the liquidating corporation for a pro tanto share of the corporate assets has all of the characteristics of an outright sale: in the place of an investment in a going concern the shareholder after liquidation has cash or its equivalent in other property. For this reason, the argument has been made that the shareholder's tax liability should be determined by the method commonly applied to the disposition of any other capital asset -- by comparing the cost or other basis of his stock with the total receipts in liquidation. Magill, "Income Tax Liability of Dividends in Liquidation," 23 Mich. L. Rev. 565, 566-567 (1925). On the other hand, a liquidating distribution may and usually does consist, at least in part, of the accumulated earnings of the corporation, and to this extent the liquidating distribution could arguably be subject to the same tax incidents attending the distribution of any other dividend. Magill, supra, at 567-568. The treatment of liquidating distributions under the early Revenue Acts reflected a vacillation between these two alternative approaches, but Congress, in 1924, finally accepted the sale analogy for purposes of Federal income tax.

The very earliest income tax statutes did not specifically refer to liquidating distributions, so that their application to a liquidating dividend was necessarily dependent upon the construction of general provisions.

Section B of the 1913 Act, 38 Stat. 167, included in income gains derived from "dividends" but failed to define that term. The Supreme Court, in interpreting the 1913 Act, indicated that liquidating distributions were not included within the term "dividend." Lynch v. Hornby, 247 U.S. 339 (1918). Cf. Lynch v. Turrish, 247 U.S. 221 (1918). The Revenue Acts of 1916 and 1917 made "dividends" taxable as income and defined the term "dividend" broadly to include any distribution by a corporation out of its earnings and profits accrued since 1913. Section 2(a), Revenue Act of 1916, 39 Stat. 757 (1916); Sections 1200, 1211, Revenue Act of 1917, 40 Stat. 329, 337-338 (1917). Under this language, liquidating distributions were held taxable as ordinary dividends to the extent of post-1913 earnings and profits. James Dobson, 1 B.T.A. 1082 (1925). See also, A. B. Nickey & Sons, 3 B.T.A. 173 (1925).

The Revenue Act of 1918, Section 201(c), 40 Stat. 1059 (1918), while defining a dividend as any distribution by a corporation out of earnings and profits accrued since 1913, added for the first time a separate provision that amounts distributed in liquidation of a corporation should be treated as payment in exchange for stock and gains realized were to be taxed to the recipient in the same fashion as were other gains from the disposition of a capital asset.

In the 1921 Act the term "dividend" was defined as before but the special provision, first contained in the 1918 Act, treating liquidating

distributions as amounts received in exchange for stock, was omitted. It was further provided that any distribution by a corporation to its shareholders other than out of earnings and profits accumulated before or after 1913 should be "applied against and reduce" the cost basis of the stock for purposes of computing gain or loss on its subsequent disposition. Section 201(c), Revenue Act of 1921, 42 Stat. 228 (1921). In describing the effect of this new provision, the Senate Finance Committee stated (S. Rep. No. 275, 67th Cong., 1st Sess., 1939-1 C.B. (Part 2) 187):

> Section 201 . . . provides a general rule for distributions in liquidation and all distributions otherwise than out of earnings accumulated since February 28, 1913. The rule is that such distributions shall be treated as a partial or full return of cost to the distributee of his stock or shares, and if the stockholder receives more than the cost price of his stock, he is taxable under section 202 with respect to the excess in the same manner as though such stock had been sold.

This provision was construed by the courts to mean that all post-1913 earnings received by shareholders through a liquidating distribution were dividends, while gain or loss on the underlying stock was to be computed by comparing the cost basis of the stock with the total of all other proceeds in liquidation. _Commissioner_ v. _Sansome_, 60 F.2d 931 (2nd Cir. 1932), _cert. denied_, 287 U.S. 667 (1932).

Finally, the 1924 Act, Section 201(c), 43 Stat. 253 (1924), returned to the theory of the 1918 Act of treating all distributions in liquidation as

payment in exchange for stock -- a principle which, except for one brief period (1934-1936), has been followed by Congress in all subsequent Revenue Acts and in the Internal Revenue Codes of 1939 and 1954.[7/] In reporting the bill which became the Revenue Act of 1924, the Senate Finance Committee said (S. Rep. No. 398, 68th Cong., 1st Sess., 1939-1 C.B. (Part 2) 247):

> The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a [taxable] dividend . . . but as a gain from the sale of property which may be treated as a capital gain. * * * A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the Act, and, furthermore, is the only method of treating such distributions which can be easily administered.

Federal law, in the Revenue Act of 1918 and since 1924, virtually without interruption, has treated a liquidating distribution in the same manner as a sale of the stock by a stockholder. <u>Even the Revenue Act of 1921, which departed from this principle by treating the liquidating distribution as a dividend to the extent of accumulated earnings, recognized that the proceeds of liquidation in excess of the part treated as a dividend</u>

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7/ Section 115(c), Internal Revenue Code of 1939, 53 Stat. 46; Section 331, Internal Revenue Code of 1954, 68A Stat. 101.

were a payment for a sale of the stock. Moreover, the legislative history of both approaches amply demonstrates that Congress, in each case, was providing a legislative solution which reflected the reality of the situation.

## CONCLUSION

For the reasons set forth above, it is respectfully urged that the relief requested herein be granted and that the judgment of the court below be reversed, or, in the alternative, that the case be remanded for such other relief as this Court deems appropriate.

Respectfully submitted,

Albert E. Arent

Joel N. Simon

Attorneys for Amici Curiae

## STATUTES INVOLVED

District of Columbia Income and Franchise Tax Act of 1947, Act of July 16, 1947, 61 Stat. 331:

D. C. Code § 47-1551c provides:

* * *

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) the word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: Provided, however, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this sub-chapter, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That the word "dividend" shall not include any dividend paid by a mutual life insurance company to its shareholders.

* * *

D. C. Code § 47-1557a provides:

Gross income and exclusions therefrom.

(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this subchapter, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this subchapter, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

* * *

(11) Capital Gains. -- Gains from the sale or exchange of any capital assets as defined in this subchapter.

* * *

D. C. Code § 47-1557b provides:

Deductions.

(a) Deductions allowed.—The following deductions shall be allowed from gross income in computing net income:

* * *

(4) Losses. -- Losses sustained during the taxable year and not compensated for by insurance or otherwise --

* * *

(B) if incurred in any transaction entered into for the production or collection of income subject to tax under this subchapter, or for the management, conservation, or maintenance of property held for the production of income subject to tax under this subchapter, though not connected with any trade or business;

* * *

(b) Deductions not allowed. — In computing net income, no deductions shall be allowed in any case for --

* * *

(6) Capital losses. — Losses from the sale or exchange of any capital asset as defined in this subchapter.

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION BY AMICI CURIAE FOR LEAVE TO FILE A MEMORANDUM IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC and the attached MEMORANDUM IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC were sent, by first-class mail, postage prepaid, to Gilbert Hahn, Jr., Esq., Attorney for Petitioner, and Henry E. Wixon, Esq., Assistant Corporation Counsel for the District of Columbia, this 1st day of July, 1966.

Joel N. Simon

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

CIRCUIT

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NO. 18,639

BEATRICE W. OPPENHEIMER, Appellant

v.

DISTRICT OF COLUMBIA, Appellee

CONSENT TO FILING OF BRIEF BY APPELLANT

Appellant consents to filing of Brief by Amici Curiae under Rule 18(j)(1).

Gilbert Hahn Jr.
GILBERT HAHN, JR., ESQ.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consent to Filing of Brief by Appellant was mailed postage prepaid this 5th day of July, 1966 to Henry Wixon, Esq., Taxation Division, Corporation Counsel's Office, 14th and E. Streets, N.W. Washington, D.C and Joel N. Simon, Esq., Federal Bar Building, Washington, D.C., attorneys for Respondent, and Amici Curiae, respectively.

Gilbert Hahn, Jr., Esq.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18639

BEATRICE W. OPPENHEIMER, PETITIONER,

v.

DISTRICT OF COLUMBIA, RESPONDENT.

MOTION BY AMICI CURIAE FOR LEAVE
TO FILE A MEMORANDUM IN SUPPORT OF
PETITIONER'S PETITION FOR REHEARING EN BANC

Pursuant to Rule 18(j)(2) of the Rules of this Court, John H. Verkouteren, Herman Oshinsky, Charles Oshinsky, William Oshinsky, Herman Fenichel, Bernard Margolius and Lilyan Margolius, as Amici Curiae, by their attorneys, Albert E. Arent and Joel N. Simon, petition the Court for leave to file the attached MEMORANDUM IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING EN BANC in the above case.

Amici Curiae respectfully urge that this Motion be granted for the following reasons:

(1) Amici Curiae are the parties involved in the case of Verkouteren, et al. v. District of Columbia, 120 U.S. App. D.C. 361,

346 F.2d 842 (1965). The _Verkouteren_ case, which was reversed by this Court on a different issue, involves, as one of its issues, the same issue that is involved in the _Oppenheimer_ case -- the basis in the hands of the shareholders of property distributed by a corporation in a liquidating distribution. The _Verkouteren_ case was remanded to the Tax Court, where it has been held in abeyance pending this Court's decision in the _Oppenheimer_ case.

(2) _Amici Curiae_ believe that this Court's decision in the _Oppenheimer_ case is in _direct conflict_ with the decision of a _different_ division of this Court in the case of _Snow_ v. _District of Columbia_ (No. 19233, November 22, 1966). _Amici Curiae_ further believe that the conflict between the _Oppenheimer_ and _Snow_ cases was not considered or recognized by the division of this Court which decided the _Oppenheimer_ case.

(3) _Amici Curiae_ believe that this Court's decision in the _Oppenheimer_ case is inconsistent with the provisions of the D. C. Income Tax Act [D. C. Code § 47-1557a(b)(11)] which completely exempt capital gains from tax. The interrelationship between corporate liquidating distributions and the capital gains exemption was neither considered nor recognized by the division of this Court which decided the _Oppenheimer_ case, but, in our opinion, is the most important single factor in resolving the basis problem.

WHEREFORE, _Amici Curiae_ respectfully request that the within Motion be granted.

Respectfully submitted,

______________________________
Albert E. Arent

______________________________
Joel N. Simon

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Attorneys for _Amici Curiae_